once. This list contains prospective assignments only and does not include cases previously assigned hearing dates. The hearings will be on the issues as presently reflected in the Official Docket of the Commission. An attempt will be made to publish notices of cancellation of hearings as promptly as possible, but interested parties should take appropriate steps to insure that they are notified of cancellation or postponements of hearings in which they are interested.

MC 127042 (Sub-No. 177), Hagen, Inc., now assigned July 14, 1977, at Chicago, Ill., is canceled, application dismissed.

MC 133095 (Sub-No. 125), Texas Continental Express, Inc., now assigned July 19, 1977, at Dallas, Tex., is canceled, application dismissed.

MC 138274 (Sub-No. 40), Shippers Best Express, Inc. now assigned July 20, 1977 at Washington, D.C. is canceled, application dismissed.

MC 107993 (Sub-No. 49), J. J. Willis Trucking Co., now assigned September 14, 1977, at Los Angeles, Calif., is canceled and reassigned for hearing on September 20, 1977 (2 days), at San Francisco, Calif., location of hearing room to be later designated.

MC 136828 (Sub-No. 14), Cook Transport, Inc., now being assigned September 6, 1977, for hearing at the Offices of the Interstate Commerce Commission in Washington, D.C.

MC 115730 (Sub-No. 23), The Mickow Corp., now assigned July 14, 1977, in Dallas, Tex., is canceled and application dismissed.

H. G. Homme, Jr.,
Acting Secretary.

[FR Doc.77-20706 Filed 7-18-77;8:45 am]

FOURTH SECTION APPLICATION FOR RELIEF

July 14, 1977.

An application, as summarized below, has been filed requesting relief from the requirements of Section 4 of the Interstate Commerce Act to permit common carriers named or described in the application to maintain higher rates and charges at intermediate points than those sought to be established at more distant points.

Protests to the granting of an application must be prepared in accordance with Rule 40 of the General Rules of Practice (49 CFR 1100.40) and filed by August 3, 1977.

FSA No. 43398—*Fibreboard, paperboard, and pulpboard to Group 19 (Los Angeles, Calif.)*. Filed by Pacific Southcoast Freight Bureau, Agent (No. 273), for interested rail carriers. Rates on fibreboard, paperboard, and pulpboard, in carloads, as described in the application, from Group 60 (Port Townsend) and Group 61 (Port Angeles), Washington, to Group 19 (Los Angeles, Calif.), on the Union Pacific railroad.

Grounds for relief—Market competition and rate relationship.

Tariff—Supplement 49 to Pacific Southcoast Freight Bureau, Agent, tariff 315-A, ICC No. 1974. Rates are published to become effective on August 14, 1977.

By the Commission.

H. G. Homme, Jr.,
Acting Secretary.

[FR Doc.77-20703 Filed 7-18-77;8:45 am]

[Section 5a Application No. 62
(Amendment No. 2)]

INTERMOUNTAIN TARIFF BUREAU, INC.

Agreement

July 7, 1977.

The Commission is in receipt of an application in the above-entitled proceeding for approval of amendments to the agreement therein approved.

Filed July 1, 1977 by:

Thomas M. Zarr, Nelson, Harding, Richards, Leonard & Tate, P.O. Box 2465, Salt Lake City, Utah 84110. (Attorney for Applicants.)

Collier L. Allen, Intermountain Tariff Bureau, Inc., P.O. Box 686, Salt Lake City, Utah 84110. (General Manager and Attorney-in-Fact.)

The Amendments involve: (1) Broadening the present 11 western state territorial scope by 17 additional states as folows: Alaska, Arkansas, Illinois, Iowa, Kansas, Kentucky, Louisiana, Minnesota, Mississippi, Missouri, Nebraska, North Dakota, Oklahoma, South Dakota, Tennessee, Texas, Wisconsin and also between points in such states and points in Canada, insofar as movement takes place in the United States; (2) Substantive organizational and procedural changes including provisions to comply with Ex Parte No. 297, Rate Bureau Investigation, 349 I.C.C. 811 and 351 I.C.C. 437; (3) Revise the member participation fees; and (4) make other incidental organizational and procedural changes for clarification or made necessary by the foregoing changes.

The complete application may be inspected at the Office of the Commission, in Washington, D.C.

Any interested person desiring to protest and participate in this proceeding shall notify the Commission in writing within 30 days from the date of publication of this notice in the Federal Register. As provided by the General Rules of Practice of the Commission, persons other than applicants should fully disclose their interest and the position they intend to take with respect to the application. Otherwise, the Commission, in its discretion, may proceed to investigate and determine the matters involved in such application without further or formal hearing.

H. G. Homme, Jr.,
Acting Secretary.

Appendix

Operating rights as modified and authorized to be acquired by Marlboro Transportation Co., Inc., are as follows:

Irregular routes: Passengers and their baggage in the same vehicle with passengers, in special operations, in nonscheduled service, limited to the transportation of not more than 11 passengers in any one vehicle, not including the driver thereof and not including children under 10 years of age who do not occupy a seat or seats, Between King of Prussia, Fort Washington and Willow Grove, Pa., on the one hand, and, on the other, New York, N.Y. Restriction: The authority granted above is restricted against service to or from John F. Kennedy International Airport and is also restricted against the transportation of persons having an immediately prior or immediately subsequent movement by water.

[FR Doc.77-20704 Filed 7-18-77;8:45 am]

[Notice No. 89T]

MOTOR CARRIER TEMPORARY AUTHORITY APPLICATIONS

July 13, 1977.

The following are notices of filing of applications for temporary authority under Section 210a(a) of the Interstate Commerce Act provided for under the provisions of CFR 1131.3. These rules provide that an original and six (6) copies of protests to an application may be filed with the field official named in the Federal Register publication no later than the 15th calendar day after the date the notice of the filing of the application is published in the Federal Register. One copy of the protest must be served on the applicant, or its authorized representative, if any, and the protestant must certify that such service has been made. The protest must identify the operating authority upon which it is predicated, specifying the "MC" docket and "Sub" number and quoting the particular portion of authority upon which it relies. Also, the protestant shall specify the service it can and will provide and the amount and type of equipment it will make available for use in connection with the service contemplated by the TA application. The weight accorded a protest shall be governed by the completeness and pertinence of the protestant's information.

Except as otherwise specifically noted, each applicant states that there will be no significant effect on the quality of the human environment resulting from approval of its application.

A copy of the application is on file, and can be examined at the Office of the Secretary, Interstate Commerce Commission, Washington, D.C., and also in the ICC Field Office to which protests are to be transmitted.

Motor Carriers of Property

No. MC 13569 (Sub-No. 32TA), filed June 29, 1977. Applicant: THE LAKE SHORE MOTOR FREIGHT COMPANY,

1200 South State Street, Girard, Ohio 44420. Applicant's represetntative: John P. Tynan, P.O. Box 1409, 167 Fairfield Road, Fairfield, N. J. 07006. Authority sought to operate as a *common carrier*, by motor vehicle, over irregular routes, transporting: *Aluminum sheet or strip*, between the plant site of Matthiessen & Hegeler Zinc Company at or near LaSalle, Ill., and the plant site of Ekco Products, Inc., at or near Clayton, N. J., for 180 days. Applicant has also filed an underlying ETA seeking up to 90 days of operating authority. Supporting shipper Matthiessen & Hegeler Zinc Company, P. O. Box 463, 1375 Ninth Street, LaSalle, Ill. 61301. Send Protests to: James Johnson, District Supervisor, Interstate Commerce Commission,731 Federal Office Bldg., 1240 East Ninth Street, Cleveland, Ohio 44199.

No. MC 28060 (Sub-No. 37TA), filed June 27, 1977. Applicant: WILLER'S INC., doing business as WILLERS TRUCK SERVICE, 1400 North Cliff Avenue, Sioux Falls, S. Dak. 57101. Applicant's representative: Bruce E. Mitchell, Suite 375, 3379 Peachtree Rd., N.E., Atlanta, Ga. 30326. Authority sought to operate as a *common carrier*, by motor vehicle, ver irregular routes, transporting *Corn cribe, grain or feed bins and watering troughs*, from Sioux Falls, S. Dak., to points in Montana, for 180 days. Applicant has also filed an underlying ETA seeking up to 90 days of operating authority. Supporting shipper: Sioux Steel Company, 196½ East Sixth St., Sioux Falls, S. Dak. 57101. Terril TeSlaa, Traffic Manager. Send protests to: J. L. Hammond, District Supervisor, Interstate Commerce Commission, Bureau of Operations, Room 455, Federal Building, Pierre, S. Dak. 57501.

No. MC 51146 (Sub-No. 507TA), filed June 29, 1977. Applicant: SCHNEIDER TRANSPORT, INC., 2661 South Broadway, Green Bay, Wis. 54304. Applicant's representative: Neil A. DuJardin (same address as applicant). Authority sought to operate as a *common carrier*, by motor vehicle, over irregular routes, transporting: *Clothing on hangers, and miscellaneous department store merchandise in cartons*, from Secaucus, N.J., to Columbus, Ohio, for 180 days. Applicant has also filed an underlying ETA seeking up to 90 days of operating authority. Supporting shipper: Lazarus Stores, Columbus, Ohio 43206 (Jack Hessenauer). Send protests to: Gail Daugherty, Transportation Assistant, Interstate Commerce Commission, Bureau of Operations, U.S. Federal Building & Courthouse, 517 East Wisconsin Avenue, Room 619, Milwaukee, Wis. 53202.

No. MC 63417 (Sub-No. 105TA), filed June 29, 1977. Applicant: BLUE RIDGE TRANSFER COMPANY, INCORPORATED, P.O. Box 13447, Roanoke, Va. 24034. Applicant's representative: William E. Bain (same as applicant). Authority sought to operate as a *common carrier*, by motor vehicle, over irregular routes, transporting: (1) *Incandescent bulbs*, from Cleveland, Ohio, to Newark, N.J.; (2) *Packaging material* for commodities in (1) above, from Newark, N.J., to Cleveland, Ohio, for 180 days. Supporting shipper: General Electric, 4504 Nela Park, Cleveland, Ohio 44112. Send protests to: Danny R. Beller, District Supervisor, Bureau of Operations, Interstate Commerce Commission, P.O. Box 210, Roanoka, Va. 24011.

No. MC 82658 (Sub-No. 8TA), filed June 30, 1977. Applicant: ECONOMY FREIGHT LINES, INC., 6357 N. Normandy Avenue, Chicago, Ill. 60631. Applicant's representative: Donald S. Mullins, 4704 W. Irving Park Road, Chicago, Ill. 60641. Authority sought to operate as a *common carrier*, by motor vehicle, over irregular routes, transporting: *Glass bottles*, from Streator, Ill., to the plantsite of G. Heileman Brewing Company, Inc., at La Crosse, Wis., for 180 days. Applicant has also filed an underlying ETA seeking up to 90 days of operating authority. Supporting shipper: G. Heileman Brewing Company, Inc., George A. Dahnke, Traffic Manager, 925 S. Third Street, La Crosse, Wis. 54601. Send protests to: Transportation Assistant Patricia A. Roscoe, Interstate Commerce Commission, Everett McKinley Dirksen Building, 219 S. Dearborn Street, Room 1386, Chicago, Ill. 60604.

No. MC 106674 (Sub-No. 241 TA), filed June 27, 1977. Applicant: SCHILLI MOTOR LINES, INC., P.O. Box 123, Remington, Ind. 47977. Applicant's representative: Linda J. Sundy, P.O. Box 123, Remington, Ind. 47977. Authority sought to operate as a *common carrier*, by motor vehicle, over irregular routes, transporting: *Building and roofing materials* (except iron and steel articles and commodities in bulk), from the plantsite and warehouse facilities of GAF Corporation at Joliet, Ill., to points in the Lower Peninsula of Michigan, Restricted to the transportation of traffic originating at the above named origin and destined to the lower peninsula of Michigan, for 180 days. Applicant has also filed an underlying ETA seeking up to 90 days of operating authority. Supporting shipper: GAF Corporation 1361 Alps Rd., Wayne, N.J. 07470. Send protests to: J.H. Gray, District Supervisor, Interstate Commerce Commission, 343 West Sayne St., Suite 113, Fort Wayne, Ind. 46802.

No. MC 107515 (Sub-No. 1085TA), filed June 28, 1977. Applicant: REFRIGERATED TRANSPORT CO., INC., 3901 Jonesboro Rd., P.O. Box 308, Forest Park, Ga. 30050. Applicant's representative: Alan E. Serby, Suite 375, 3379 Peachtree Rd. N.E., Atlanta, Ga. 30326. Authority sought to operate as a *common carrier*, by motor vehicle, over irregular routes, transporting: *Carpet and tufted textile products*, from Dalton, Ga. to points in Kansas, Missouri, Nebraska and that portion of Iowa on and west of U.S. Highway 59, for 180 days. Supporting shipper: World Carpet, P.O. Box 1448, Dalton, Ga. 30720. Send protests to: Sara K. Davis, Transportation Assistant, Bureau of Operations, Interstate Commerce Commission, 1252 W. Peachtree St., N.W. Rm. 546, Atlanta, Ga. 30309.

No. MC 110252 (Sub-No. 64TA), filed June 24, 1977. Applicant: JAMES J. WILLIAMS, INC., E. 5711 Third Avenue, Spokane, Wash. 99206. Applicant's representative: John D. Robertson (same address as applicant). Authority sought to operate as a *common carrier*, by motor vehicle, over irregular routes, transporting: *Edible flour*, From Spokane, Wash., to Lewiston, Idaho, for 180 days. Applicant has also filed an underlying ETA seeking up to 90 days of operating authority. Supporting shipper: Centennial Mills Division of Univar, 1464 N.W. Front Ave., P.O. Box 3773, Portland, Oreg. 97208. Send protests to: L. D. Boone, Transportation Specialist, Bureau of Operations, Interstate Commerce Commission, 858 Federal Building, Seattle, Wash. 98174.

No. MC 112520 (Sub-No. 342TA), filed June 22, 1977. Applicant: MCKENZIE TANK LINES, INC., P.O. Box 1200, 122 Appleyard Drive, Tallahassee, Fla. 32302. Applicant's representative: Sol H. Proctor, 1101 Blackstone Building, Jacksonville, Fla. 32202. Authority sought to operate as a *common carrier*, by motor vehicle, over irregular routes, transporting: *Paints, varnishes, lacquers, resins, stains, and paint material*, in bulk, in tank vehicles, from Covington, Ga., to points in Cheraw, S.C., for 180 days. Applicant has also filed an underlying ETA seeking up to 90 days of operating authority. Supporting shipper: Mobil Chemical Co., Division of Mobil Oil Corp., 1024 South Avenue, Plainfield, N.J. 07062. Send protests to: District Supervisor G. H. Fauss, Jr., Bureau of Operations, Interstate Commerce Commission, Box 35008, 400 West Bay Street, Jacksonville, Fla. 32202.

No. MC 112822 (Sub-No. 420TA), filed June 28, 1977. Applicant: BRAY LINES, INCORPORATED, 1401 N. Little, P.O. Box 1191, Cushing, Okla. 74023. Applicant's representative: Charles D. Midkiff (same address as applicant). Authority sought to operate as a *common carrier*, by motor vehicle, over irregular routes, transporting: *Foodstuffs* (except commodities in bulk), from Duluth, Minn. and Superior, Wis., to points in Colorado, restricted to the transportation of traffic originating at the plantsite and warehouse facilities of Jeno's, Inc., located at or near Duluth, Minn. and Superior, Wis. for 180 days. Supporting shipper: Jeno's, Inc., 525 Lake Ave., S. Duluth, Minn. 55802. Send protests to: District Supervisor Joe Green, Rm. 240, Old Post Office Bldg., 215 Northwest Third St., Oklahoma City, Okla. 73102.

No. MC 113622 (Sub-No. 18TA), filed June 28, 1977. Applicant: SAMPSON HAULING CORP., Pavilion, N.Y. 14525. Applicant's representative: Kenneth T. Johnson, Bankers Trust Building, Jamestown, N.Y. 14701. Authority sought to operate as a *common carrier*, by motor vehicle, over irregular routes, transporting: *RIP-RAP*, from Middlebury Cen-

ter, Pa., and points within ten (10 miles thereof to all points and places in Steuben County, N.Y., for 180 days. Applicant has also filed an underlying ETA seeking up to 90 days of operating authority. Supporting shipper: Potter-DeWitt, Inc., Pavilion, N.Y. 14525. Send protests to: George M. Parker, District Supervisor, Interstate Commerce Commission, Bureau of Operations, 910 Federal Building, 111 West Huron Street, Buffalo, N.Y. 14202.

No. MC 115092 (Sub-No. 62TA), filed June 24, 1977. Applicant: TOMAHAWK TRUCKING, INC. a Colorado corporation, P.O. Box O, Vernal, Utah 84078. Applicant's representative: Walter Kobos, 1016 Kehoe Drive, St. Charles, Ill. 60174. Authority sought to operate as a *common carrier*, by motor vehicle, over irregular routes, transporting: *Montmorillonite clay* in bags, from the facilities of Industrial Mineral Ventures, Inc., near Lathrop Wells, Nev., to points in Arkansas, Colorado, Idaho, Illinois, Kansas Louisiana Minnesota, Mississippi, Missouri Montana, Nebrasks, New Jersey, New Mexico, North Dakota, Ohio, Oklahoma Oregon, Texas, Washington, Wisconsin Wyoming and Utah (except Salt Lake City and 40 miles thereof), for 180 days. Applicant has also filed an underlying ETA seeking up to 90 days of operating authority. Supporting shipper: Industrial Mineral Ventures, Inc., 5920 McIntyre St., Golden, Colo. 80401. Send protests to: District Supervisor Lyle D. Helfer, Interstate Commerce Commission, Bureau of Operations, 5301 Federal Building, 125 South State St., Salt Lake City, Utah 84138.

No. MC 117068 (Sub-No. 81TA), filed June 23, 1977. Applicant: MIDWEST SPECIALIZED TRANSPORTATION, INC., P.O. Box 6418, North Highway 63, Rochester, Minn. 55901. Applicant's representative: Mr. A. I. Koenig (same address as above). Authority sought to operate as a *common carrier*, by motor vehicle, over irregular routes, transporting: *Enameled steel silos, loading and unloading devices, waste storage tanks, livestock feed bunkers, forage metering devices, animal waste spreader tanks, livestock feeding systems, and parts and accessories* for the above named commodities from DeKalb and Eureka, Ill., to points in New York and Pennsylvania, for 180 days. Applicant has also filed an underlying ETA seeking up to 90 days of operating authority. Supporting shipper: A. O. Smith Corporation, P.O. Box 584, Milwaukee, Wis. 53201. Send protests to: Mrs. Marion L. Cheney, Transportation Assistant, Interstate Commerce Commission, Bureau of Operations, 414 Federal Building & U.S. Court House, 110 S. 4th St., Minneapolis, Minn. 55401.

No. MC 117119 (Sub-No. 637TA), filed June 15, 1977. Applicant: WILLIS SHAW FROZEN EXPRESS, INC., P.O. Box 188, Elm Springs, Ark. 72728. Applicant's representative: L. M. McLean (same address as applicant). Authority sought to operate as a *common carrier*, by motor vehicle, over irregular routes, transporting: *Foodstuffs* (except commodities in bulk), in vehicles equipped with mechanical refrigeration, from the facilities of Borden Foods, Division of Borden, Inc., at Wellsboro, Pa., to points in Oregon, Utah, and Washington, for 180 days. Applicant has also filed an underlying ETA seeking up to 90 days of operating authority. Supporting shipper: Borden Foods, Division of Borden, Inc., 180 East Broad Street, Columbus, Ohio 43215. Send protests to: District Supervisor William H. Land, Jr., 3108 Federal Office Building, 700 West Capitol, Little Rock, Ark. 72201.

No. MC 117119 (Sub-No. 638TA), filed June 20, 1977. Applicant: WILLIS SHAW FROZEN EXPRESS, INC., P.O. Box 188, Elm Springs, Ark. 72728. Applicant's representative: Martin M. Geffon, P.O. Box 338, Willingboro, N.J. 08046. Authority sought to operate as a *common carrier*, by motor vehicle, over irregular routes, transporting: *Such merchandise* as dealt in retail sewing centers, from Trumann, Ark.; to Albuquerque, N. Mex.; Denver, Colo.; Des Moines, Iowa; Los Angeles, Calif.; Minneapolis, Minn.; Phoenix, Ariz.; Portland, Oreg.; San Francisco, Calif.; and Seattle, Wash.; for 180 days. Supporting shipper: The Singer Company, 313 Underhill Blvd., Syossett, N.Y. 11791. Send protests to: District Supervisor William H. Land, Jr., 3108 Federal Building, 700 West Capitol, Little Rock, Ark. 72201.

No. MC 117119 (Sub-No. 644TA), filed June 27, 1977. Applicant: WILLIS SHAW FROZEN EXPRESS, INC., P.O. Box 188, Elm Springs, Ark. 72728. Applicant's representative: Gerald K. Gimmel, Suite 145, 4 Professional Drive, Gaithersburg, Md. 20760. Authority sought to operate as a *common carrier*, by motor vehicle, over irregular routes, transporting: *Cleaning and washing compounds, oven cleaners, sodium bicarbonate and sal soda* (except in bulk), from the plantsite and storage facilities of Church & Dwight Co., Inc., in Syracuse, N.Y.; to points in Colorado, Idaho, Montana, New Mexico, North Dakota, South Dakota, Utah & Wyoming, for 180 days. Applicant has also filed an underlying ETA seeking up to 90 days or operating authority. Supporting shipper: Church & Dwight Co., Inc., P.O. Box 369, Piscataway, N.J. 08554. Send protests to: District Supervisor William H. Land, Jr. 3108 Federal Office Building, 700 West Capitol, Little Rock, Ark. 72201.

No. MC 118831 (Sub-No. 151TA), filed June 28, 1977. Applicant: CENTRAL TRANSPORT, INCORPORATED, P.O. Box 7007, High Point, N.C. 27264. Applicant's representative: Earlie O. Jones (same address as applicant). Authority sought to operate as a *common carrier*, by motor vehicle, over irregular routes, transporting: *Chemicals*, in bulk, in tank vehicles and hopper-type trucks, from the plant site of Tennessee Eastman Company, Kingsport, Tennessee, to points in the U.S. in and east of Minnesota, Iowa, Nebraska, Kansas, Oklahoma and Texas, for 180 days. Applicant has also filed an underlying ETA seeking up to 90 days of operating authority. Supporting shipper: Tennessee Eastman Company, P.O. Box 511, Kingsport, Tenn. 37622. Send protests to: Archie W. Andrews, Dist. Supervisor, Bureau of Operations, Interstate Commerce Commission, P.O. Box 26896, Raleigh, N.C. 27611.

No. MC 120279 (Sub-No. 8TA), filed June 27, 1977. Applicant: McFARLAND AND HULLINGER, a Utah limited Partnership, 915 North Main St., P.O. Box 238, Tooele, Utah 84074. Applicant's representative: Irene Warr, 430 Judge Building, Salt Lake City, Utah 84111. Authority sought to operate as a *common carrier*, by motor vehicle, over irregular routes, transporting: *Unanium and vanadium ores or concentrates*, from the Waltman Mine located 1½ miles east of U.S. Highway 395 at a point 35 miles north of Reno, Nev. in Lassen County, Calif. to the Cotter Corporation Mill located approximately 4 miles south of Canon City, Colo., for 180 days. Applicant has also filed an underlying ETA seeking up to 90 days of operating authority. Supporting shipper: UOCO, Inc., 304 First Security Building, Salt Lake City, Utah 8311. Send protests to: District Supervisor Lyle D. Helfer, Interstate Commerce Commission, 5301 Federal Building, 125 South State St., Salt Lake City, Utah 84138.

No. MC 124813 (Sub-No. 175TA), filed June 22, 1977. Applicant: UMTHUN TRUCKING CO., 910 South Jackson St., P.O. Box 166, Eagle Grove, Iowa 50533. Applicant's representative: James M. Hodge, 1980 Financial Center, Des Moines, Iowa 50309. Authority sought to operate as a *common carrier*, by motor vehicle, over irregular routes, transporting: *Phosphatic feed ingredients*, (1) from Mediapolis, Iowa to points in Illinois, Indiana, Iowa, Kentucky, Ohio, Arkansas, Oklahoma and Michigan, and (2) from Eagle Grove, Iowa to points in Iowa, Kentucky, Ohio, Arkansas, Oklahoma and Michigan. Restriction: Restricted to traffic having a prior movement by rail for 180 days. Applicant has also filed an underlying ETA seeking up to 90 days of operating authority. Supporting shipper: Occidental Chemical Company, P.O. Box 1185, Houston, Tex. 77001. Send protests to: Herbert W. Allen, District Supervisor, Bureau of Operations Interstate Commerce Commission, 518 Federal Building, Des Moines, Iowa 50309.

No. MC 125433 (Sub-No. 103TA), filed June 23, 1977. Applicant: F-B TRUCK LINE COMPANY, a Utah corporation, 1945 South Redwood Rd., Salt Lake City, Utah 84104. Applicant's representative: Michael J. Norton, Suite 404, Boston Bldg., P.O. Box 2135, Salt Lake City, Utah 84110. Authority sought to operate as a *common carrier*, by motor vehicle, over irregular routes, transporting: *Self-propelled vehicles* under 15,000 lbs. used in farming or agricultural operation, (except automobiles, buses, and trucks as described by the ICC), from Portland,

Oreg., to California points and points in Oregon south of the 44th parallel, for 180 days. Applicant has also filed an underlying ETA seeking up to 90 days of operating authority. Supporting shipper: John Deere Company, 2100 NE (181st. Ave. Portland, Oreg. 97220. Send protests to: District Supervisor Lyle D. Helfer, Interstate Commerce Commission, Bureau of Operations, 5301 Federal Building, 125 South State St., Salt Lake City, Utah 84138.

No. MC 125433 (Sub-No. 104TA), filed June 23, 1977. Applicant: F-B TRUCK LINE COMPANY, a Utah corporation, 1945 South Redwood Rd., Salt Lake City, Utah 84104. Applicant's representative David J. Lister (same address as applicant). Authority sought to operate as a *common carrier*, by motor vehicle, over irregular routes, transporting: *Montmorillonite clay* in bags, from the facilities of Industrial Mineral Ventures, Inc., near Lathrop Wells, Nev., to points in Arkansas, Colorado, Idaho, Illinois, Kansas, Louisiana, Minnesota, Mississippi, Missouri, Montana, Nebraska, New Jersey, New Mexico, North Dakota, Ohio, Oklahoma, Oregon, Texas, Utah (except Salt Lake City and 40 miles thereof), Washington, and Wyoming, for 180 days. Applicant has also filed an underlying ETA seeking up to 90 days of operating authority. Supporting shipper: Industrial Mineral Ventures, Inc., 5920 McIntyre St., Golden, Colo. 80401. Send protests to: District Supervisor, Lyle D. Helfer, Interstate Commerce Commission, Bureau of Operations, 5301 Federal Building, 125 South State St., Salt Lake City, Utah 84138.

No. MC 127303 (Sub-No. 24TA), filed June 27, 1977. Applicant: ZELLMER TRUCK LINES, Box 343, Granville, Ill. 61326. Applicant's representative: E. Stephen Heisley, Suite 805, 666 11th St. N.W., Washington, D.C. 20001. Authority sought to operate as a *common carrier*, by motor vehicle, over irregular routes, transporting: *Malt beverages and related advertising materials, equipment and supplies*, from St. Paul, Minn. to Paducah, Ky. for 180 days. Applicant has also filed an underlying ETA seeking up to 90 days of operating authority. Supporting shipper: Chief Paduke Dist. Co. Inc., George G. Jacobs, President, Corner of 12th and Flournoy St., Paducah, Ky. Send protests to: Transportation Assistant Patricia A. Roscoe, Interstate Commerce Commission, Everett McKinley Dirksen Building, 219 S. Dearborn St., Room 1386, Chicago, Ill. 60604.

No. MC 129063 (Sub-No. 13TA), filed June 23, 1977. Applicant: JIMMY T. WOOD, P.O. Box 294, Route 6, Ripley, Tenn. 38063. Applicant's representative: Mr. Thomas A. Stroud, 5100 Poplar, Suite 2008, Memphis, Tenn. 38137. Authority sought to operate as a *common carrier*, by motor vehicle, over irregular routes, transporting: *Ferro alloys* in dump vehicles, from the plantsite and facilities of Chromium Mining & Smelting Corp., located at or near Woodstock, Tenn., to points in the United States (except Alaska and Hawaii), for 180 days. Applicant has also filed an underlying ETA seeking up to 90 days of operating authority. Supporting shipper: Chromium Mining & Smelting Corp., P.O. Box 28538, Memphis, Tenn 38128. Send protests to. Mr. Floyd A. Johnson, District Supervisor, Interstate Commerce Commission, 100 North Main St., 100 North Main Building, Suite 2006, Memphis, Tenn. 38103.

No. MC 133221 (Sub-No. 26TA), filed June 28, 1977. Applicant: OVERLAND CO., INC., 1991 Buford Highway, Lawrenceville, Ga. 30245. Applicant's representative: Alvin Button, 2477 N. Decatur Rd., Decatur, Ga. 30033. Authority sought to operate as a *common carrier*, by motor vehicle, over irregular routes, transporting: *Ridgid polystyrene*, from the Southeastern Foam Products, Inc. plantsites at Conyers, Ga.; Adamstown, Md.; Bargersville, Ind.; Burlington, N.C.; Elkhorn, Wis.; Foglesville, Pa.; Jonesboro, Tenn.; New Middletown, Ohio; Ocala, Fla.; Petersburg, Va.; Wentzville, Mo. to points in the U.S. (except Alaska and Hawaii) for 180 days. Applicant has also filed an underlying ETA seeking up to 90 days of operating authority. Supporting shipper: Southeastern Foam Products, P.O. Box 406, Conyers, Ga. 30207. Send protests to: Sara K. Davis, Transportation Assistant, Bureau of Operations, Interstate Commerce Commission, 1252 W. Peachtree St., N.W., Room 546, Atlanta, Ga. 30309.

No. MC 135082 (Sub-No. 48TA), filed June 28, 1977. Applicant: BURSCH TRUCKING, INC., doing business as, ROADRUNNER TRUCKING, INC., Post Office Box 26748, 415 Rankin Rd. N.E., Albuquerque, N. Mex. 87125. Applicant's representative: D. F. Jones, President (same address as applicant). Authority sought to operate as a *common carrier*, by motor vehicle, over irregular routes, transporting: *Gypsum, gypsum products and materials, and accessories* used in the installation thereof, from Rosario, N. Mex., to points in the States of Arizona, Colorado, Wyoming, Nebraska, and Kansas, for 180 days. Applicant has also filed an underlying ETA seeking up to 90 days of operating authority. Supporting shipper: Western Gypsum Company, Rosario, N. Mex. 87501, Pete Wupper, Manager. Send protests to: Darrell W. Hammonds, District Supervisor, Interstate Commerce Commission, Bureau of Operations, 1106 Federal Office Building, 517 Gold Ave. SW, Albuquerque, N. Mex. 87101.

No. MC 135236 (Sub-No. 20TA), filed June 23, 1977. Applicant: LOGAN TRUCKING, INC., 801 Erie Avenue, Logansport, Ind. 46947. Applicant's representative: Donald W. Smith, One Indiana Square, Suite 2456, Indianapolis, Ind. 46204. Authority sought to operate as a *common carrier*, by motor vehicle, over irregular routes, transporting: *Malt beverages*, from Norfolk, Va., to points in Illinois, Indiana, Michigan, Wisconsin, Ohio and Arkansas, for 180 days. Applicant has also filed an underlying ETA seeking up to 90 days of operating authority. Supporting shipper: Champale, Inc., Trenton, N.J. Send protests to: J. H. Gray, District Supervisor, Interstate Commerce Commission, 343 West Wayne Street, Suite 113, Fort Wayne, Ind. 46802.

No. MC 135797 (Sub-No. 79TA), filed June 28, 1977. Applicant: J. B. HUNT TRANSPORT, INC., P.O. Box 200, U.S. Hwy 71, Lowell, Ark. 72745. Applicant's representative: Paul A. Maestri (same address as applicant). Authority sought to operate as a *common carrier*, by motor vehicle, over irregular routes, transporting: *Polystyrene food containers*, from the warehouse facilities utilized by Mobil Chemical Company, located at or near Dallas-Fort Worth, Tex., Metropolitan Zone, to Denver, Colo., for 180 days. Applicant has also filed an underlying ETA seeking up to 90 days of operating authority. Supporting shipper: Mobil Oil Corporation, 8350 N. Central Expressway, Suite 522, Dallas, Tex. 75206. Send protests to: District Supervisor William H. Land, Jr., 3108 Federal Office Building, 700 West Capitol, Little Rock, Ark. 72201.

No. MC 136220 (Sub-No. 43TA), filed June 24, 1977. Applicant: ROY SULLIVAN, doing business as SULLIVAN TRUCKING CO., P.O. Box 2164, Ponca City, Okla. 74601. Applicant's representative: G. Timothy Armstrong, 6161 N. May Avenue, Oklahoma City, Okla. 73112. Authority sought to operate as a *common carrier*, by motor vehicle, over irregular routes, transporting: *Fish meal* (in bulk, in open top dump trailers), from Empire, La., to Dardanelle, Fayetteville, Ft. Smith, Batesville, Springdale, Hope, North Little Rock, and Nashville, Ark., for 180 days. Applicant has also filed an underlying ETA seeking up to 90 days of operating authority. Supporting shipper: Wilbur-Ellis Co., 1000 Plaza West Bldg., Little Rock, Ark. 72207. Send protests to: District Supervisor Joe Green, Rm. 240, Old Post Office Bldg., 215 Northwest Third St., Oklahoma City, Okla. 73102.

No. MC 138742 (Sub-No. 9TA), filed June 28, 1977. Applicant: OSTERKAMP TRUCKING, INC., 1049 N. Glassell, Orange, Calif. 92667. Applicant's representative: Michael Eggleton, 67 Lakstone Court, Danville, Calif. 94526. Authority sought to operate as a *common carrier*, by motor vehicle, over irregular routes, transporting: *Corrugated fibre cartons*, from the plantsite of Western Kraft Paper Group, Division of Willammette Industries, at Compton, Calif., to points in Saguache, Rio Grande, Alamosa Counties, Colo., for 180 days. Applicant has also filed an underlying ETA seeking up to 90 days of operating authority. Supporting shipper: Western Kraft Paper Group, Division of Willammette Industries, Inc., 19615 South Susana Rd., Compton, Calif. 90221. Send protests to: Irene Carlos, Transportation Assistant, Interstate Commerce Commission, Rm. 1321 Federal Building, 300 North Los Angeles St., Los Angeles, Calif. 90012.

No. MC 140176 (Sub-No. 7TA), filed June 28, 1977. Applicant: RILEY WAYNE POWELL, doing business as POWELL TRUCKING COMPANY, Route 3, Box 13, Sumrall, Miss. 39482. Applicant's representative: Fred W. Johnson, Jr., 1500 Deposit Guaranty Plaza, P.O. Box 22628, Jackson, Miss. 39205. Authority sought to operate as a *contract carrier*, by motor vehicle, over irregular routes, transporting: *Posts, poles and piling, treated or untreated*, from the facilities of Crown Zellerbach Corporation at Gulfport, Miss., and Mobile, Ala., to points in Illinois, Indiana, Iowa, Kansas, Kentucky, Michigan, Minnesota, Missouri, Nebraska, Ohio, Pennsylvania, and Wisconsin, under a continuing contract or contracts with Crown Zellerbach Corporation, for 180 days. Applicant has also filed an underlying ETA seeking up to 90 days of operating authority. Supporting shipper: Crown Zellerbach Corporation, P.O. Box 1060, Bogalusa, La. 70427. Send protests to: Alan C. Tarrant, District Supervisor, Interstate Commerce Commission, Rm. 212, 145 East Amite Building, Jackson, Miss. 39201.

No. MC 140452 (Sub-No. 5TA), filed June 22, 1977. Applicant: ROSE BROTHERS TRUCKING, INC., R.R. 31, Box 9, Terre Haute, Ind. 47803. Applicant's representative: Alki E. Scopelitis, 815 Merchants Bank Bldg., Indianapolis, Ind. 46204. Authority sought to operate as a *common carrier*, by motor vehicle, over irregular routes, transporting: (1) *Fertilizer and cullet*, from the Owensboro Riverport Authority at Owensboro, Ky., to Terre Haute, Ind., and (2) Salt, from the Owensboro Riverport Authority at Owensboro, Ky., to points in Indiana, on and south of U.S. Highway 40 and points in Kentucky, for 180 days. Applicant has also filed an underlying ETA seeking up to 90 days of operating authority. Supporting shipper: Owensboro Riverport Authority, P.O. Box 711, Owensboro, Ky. 42301. Send protests to: William S. Ennis, Interstate Commerce Commission, Federal Bldg. and U.S. Courthouse, 46 East Ohio St., Rm. 429 Indianapolis, Ind. 46204.

No. MC 140612 (Sub-No. 21TA), filed June 24, 1977. Applicant: ROBERT F. KAZIMOUR, P.O. Box 2207, Cedar Rapids, Iowa 52406. Applicant's representative: J. L. Kazimour (same address as applicant). Authority sought to operate as a *common carrier*, by motor vehicle, over irregular routes, transporting: *Empty containers and closures*, from San Diego, Calif., to Davenport, Iowa and points in the Commercial Zones of Milan, and Rock Island, Ill., for 180 days. Applicant has also filed an underlying ETA seeking up to 90 days of operating authority. Supporting shipper: Ralston Purina Co., Checkerboard Square, St. Louis, Mo. 63188. Send protests to: Herbert W. Allen, District Supervisor, Bureau of Operations, Interstate Commerce Commission, 518 Federal Building, Des Moines, Iowa 50309.

No. MC 140682 (Sub-No. 3TA), filed June 22, 1977. Applicant: NEW (TRANS) PORT, INC., P.O. Box 188, US Highway 17 South, Riceboro, Ga. 31323. Applicant's representative: Sol H. Proctor, 1101 Blackstone Building, Jacksonville, Fla. 32202. Authority sought to operate as a *contract carrier*, by motor vehicle, over irregular routes, transporting: *Lumber*, from Brooklet and Riceboro, Ga., to points in Florida, Alabama, North Carolina, and South Carolina, under a continuing contract, or contracts, with Amax Forest Products, for 180 days. Applicant has also filed an underlying ETA seeking up to 90 days of operating authority. Supporting shipper: Amax Forest Products, Box 268, Riceboro, Ga. 31323. Send protests to: District Supervisor G. H. Fauss, Jr., Bureau of Operations, Interstate Commerce Commission, Box 35008, 400 West Bay Street, Jacksonville, Fla. 32202.

No. MC 141728 (Sub-No. 4TA), filed June 23, 1977. Applicant: WILMINGTON CORP., Northern Industrial Park, Wilmington, Mass. 01887. Applicant's representative: Donna Vitter Plott, 1 Center Plaza, Boston, Mass. 02108. Authority sought to operate as a *contract carrier*, by motor vehicle, over irregular routes, transporting: *Such commodities* as are sold or used in retail stores (except commodities in bulk and commodities requiring the use of special equipment) for the account of Edison Brothers Stores, Inc. and its subsidiaries, between facilities owned or utilized by Edison Brothers Stores, Inc. and its subsidiaries in Wilmington, Mass., St. Louis, Mo., and Hoboken, N.J., under a continuing contract with Edison Brothers Stores, Inc. Applicant intends to tack authority applied for to authority in MC 141728 (Sub-No. 2) for 180 days. Supporting shipper: Edison Brothers Stores, Inc., 400 Washington Ave., St. Louis, Mo. 63178. Send protests to: Max Gorenstein, District Supervisor, Bureau of Operations, Interstate Commerce Commission, 150 Causeway St., Boston, Mass. 02114.

No. MC 141914 (Sub-No. 11TA), filed June 20, 1977. Applicant: FRANKS & SON, INC., P.O. Box 108A, Route 1, Big Cabin, Okla. 74332. Applicant's representative: Gary Brasel, Mezzanine Floor, Beacon Bldg., Tulsa, Okla. 74103. Authority sought to operate as a *common carrier*, by motor vehicle, over irregular routes, transporting: *Water* (not in bulk), and *return bottling machinery, glass bottles, plastic bottles, plastic pouches* to be filled with water, *corrugated cardboard, styrofoam, bottle caps, bottle seals, returned wood or plastic pallets, advertising and promotional material, machine repair parts, steel banding material* for palletizing purposes, *printed labels and any other items* used in the bottling and distribution of water, between Poland Spring, Maine, and all points in the U.S. (except Hawaii and Alaska), for 180 days. Applicant has also filed an underlying ETA seeking up to 90 days of operating authority. Supporting shipper: Poland Spring Bottling Co., P.O. Box 19628, Las Vegas, Nev. 89119. Send protests to: District Supervisor Joe Green, Rm. 240, Old Post Office Bldg., 215 Northwest Third St., Oklahoma City, Okla. 73102.

No. MC 143282 (Sub-No. 1TA), June 28, 1977. Applicant: EDWIN KRELL, doing business as KRELL TRUCK SERVICE, Plankinton, S. Dak. 57368. Applicant's representative: Edwin Krell (same address as applicant). Authority sought to operate as a *common carrier*, by motor vehicle, over irregular routes, transporting: (1) *Carpet*, from Dalton, Eton, Chatsworth, Calhoun, Elijay, and Cartersville, Ga., to Plankinton, South Dakota, (2) *carpet accessories and supplies*, from Piqua, Ohio, to Plankinton, S. Dak., for 180 days. Applicant has also filed an underlying ETA seeking up to 90 days of operating authority. Supporting shipper: Centennial Carpet, Inc., 209 North Main, Plankinton, S. Dak. 57368, Richard Cazer. Send protests to: J. L. Hammond, District Supervisor, Interstate Commerce Commission, Bureau of Operations, Rm. 455, Federal Building, Pierre, S. Dak. 57501.

No. MC 143338 (Sub-No. 1TA), filed June 23, 1977. Applicant: MAURICE GULLEMETTE, INC., St. Gregoire, Nicolet County, Quebec, Canada. Applicant's representative: Robert D. Schuler, 100 West Long Lake Rd., Suite 102, Bloomfield Hills, Mich. 48013. Authority sought to operate as a *contract carrier*, by motor vehicle, over irregular routes, transporting: (1) *Dog or cat food*, in cans or packages, from ports of entry on the International Boundary Line, between the United States and Canada on the St. Clair River to points in Michigan, (2) *inedible meat and by-products of meat*, from Plainwell, Mich. to ports of entry on the International Boundary Line between the United States and Canada on the St. Clair River. Restricted in paragraph 1 and 2 above to shipments originating at or destined to points in Canada, under a continuing contract or contracts with Jean Demers, Inc. of Gentilly, Quebec, Canada, for 180 days. Applicant has also filed an underlying ETA seeking up to 90 days of operating authority. Supporting shipper: Jean Demers, Inc., CP 150, Gentilly, Quebec, Canada GOX 1GO. Send protests to: District Supervisor David A. Demers, Interstate Commerce Commission, P.O. Box 548, 87 State St., Montpelier, Vt. 05602.

No. MC 143389TA, filed June 16, 1977. Applicant: MERCHANTS DUTCH EXPRESS, INC., P.O. Box 2525, 700 Pine St., Monroe, La. 71207. Applicant's representative: Bruce E. Mitchell, Suite 375, 3379 Peachtree Rd. N.E., Atlanta, Ga. 30326. Authority sought to operate as a *contract carrier*, by motor vehicle, over irregular routes, transporting: *Such commodities* as are dealt in by retail discount stores, between Monroe, La. on the one hand, and, on the other, points in Kentucky, Tennessee, Georgia, Florida, Alabama, Mississippi, Louisiana, Arkansas, Texas, Oklahoma, Virginia, Missouri, Indiana, Illinois, North Carolina,

South Carolina, Ohio, and West Virginia, service to be performed under a contract or continuing contracts with Howard Bros. Discount Stores, Inc., for 180 days. Applicant has also filed an underlying ETA seeking up to 90 days of operating authority. Supporting shipper: Howard Bros. Discount Stores, Inc., 801 Riverbarge, Monroe, La. 71202. Send protests to: District Supervisor William H. Land, Jr., 3108 Federal Office Building, 700 West Capitol, Little Rock, Ark. 72201.

No. MC 143398TA, June 28, 1977. Applicant: C. C. ROBERTS CONCRETE CONSTRUCTION CO., INC., 3725 Gibbon Rd., Charlotte, N.C. 28213. Applicant's representative: Ralph McDonald, P.O. Box 2246, Raleigh, N.C. 27602. Authority sought to operate as a *common carrier*, by motor vehicle, over irregular routes, transporting: *Dry animal and poultry feed ingredients* in bulk in dump vehicles, from Gaston County, N.C.; to Sumter County, S.C., for 180 days. Applicant has also filed an underlying ETA seeking up to 90 days of operating authority Supporting shipper: Carolina By-Products Company, Inc. P.O. Drawer 20687, Greensboro, N.C. 27420. Send protests to: District Supervisor Terrell Price, Interstate Commerce Commission, 800 Briar Creek Rd., Mart Office Bldg., Rm. CC-516, Charlotte, N.C. 28205.

No. MC 143400 (Sub-No. 1TA), filed June 24, 1977. Applicant: NEIL J. MONAHAN AND LEILANI A. MONAHAN, doing business as MONAHAN TRANSPORTATION, Route 4, Box 305 Winona, Minn. 55987. Applicant's representative: Val M. Higgins, 1000 First National Bank Bldg., Minneapolis, Minn. 55402. Authority sought to operate as a *contract carrier*, by motor vehicle, over irregular routes, transporting: *Salt*, in packages, from Winona, Minn., to points in Wisconsin, under a continuing contract with Diamond Crystal Salt Company, for 180 days. Applicant has also filed an underlying ETA seeking up to 90 days of operating authority. Supporting shipper: Diamond Crystal Salt Company, 916 S. Riverside Ave., St. Clair, Mich. 48079. Send portests to: Mrs. Marion L. Cheney, Transportation Assistant, Interstate Commerce Commission, Bureau of Operations, 414 Federal Building & U.S. Couurt House, 110 S. 4th St., Minneapolis, Minn. 55401.

No. MC 143407 (Sub-No. 1TA), June 28, 1977. Applicant: MODERN TRANSPORT, INC., 30127 Austin, Warren, Mich. 48092. Applicant's representative: William B. Elmer, 21635 E. Nine Mile Rd., St. Clair Shores, Mich. 48080. Authority sought to operate as a *common carrier*, by motor vehicle, over irregular routes, transporting: *Silica sand*, in bulk, in dump vehicles, from Rockwood, Mich., to Columbus, Toledo and Lancaster Ohio, for 180 days. Supporting shipper: Ottawa Silica Company, Richard Lawrence, Director of Physical Distribution, P.O. Box 577, Ottawa, Ill. Send protests to: Interstate Commerce Commission, Bureau of Operations, 604 Federal Building & U.S. Courthouse, 231 W. Lafayette Blvd., Detroit, Mich. 48226.

By the Commission.

H. G. Homme, Jr.,
Acting Secretary.

[FR Doc.77-20705 Filed 7-18-77;8:45 am]

sunshine act meetings

CONTENTS

1

CIVIL AERONAUTICS BOARD.

ADDITION OF ITEM TO JULY 15, 1977 MEETING AGENDA

REVISED AGENDA

TIME AND DATE: 10 a.m., July 15, 1977.

PLACE: Room 1027, 1825 Connecticut Avenue NW., Washington, D.C. 20428.

SUBJECT: 1. Ratifications of Items Adopted by Notation.[1] 2. Docket 28915, Complaint of the City of Youngstown, Ohio regarding adequacy of service provided by Allegheny Airlines, Inc., Docket 28944, Application of Allegheny Airlines to delete Youngstown, Ohio and Docket 29085, Application of Alleghney Airlines for temporary suspension of service at Youngstown, Ohio. 3. Dockets 31053, 31054, 31055, 31058 "SimpleSaver" fares proposed by Allegheny.

STATUS: Open.

PERSON TO CONTACT:

Phillis T. Kaylor, The Secretary, 202–673–5068.

SUPPLEMENTARY INFORMATION: On June 9, 1977, Allegheny filed a tariff proposing certain discount "SimpleSaver" fares in nine markets with a proposed effective date of July 15, 1977. Complaints and answers were filed by July 6, 1977. The Board's staff analyzed the tariff filing, the complaints and answers thereto and all other relevant matters and submitted a request for instructions to the Board on July 12, 1977. On July 13, 1977, Allegheny requested and received oral permission to postpone the proposed effective date of its tariff until July 22, 1977. If the Board desires to suspend the tariff pending investigation, then it must act by July 21, 1977, or lose the authority to do so under Section 1002(g) of the Federol Aviation Act of 1958. Because of the importance and complexity of the issues involved, and in order to give the Board sufficient time to consider the matter and instruct its staff to prepare an order implementing the Board's decision, it is the Board's view that it should meet to begin its consideration of this matter at the earliest possible time. Accordingly, the following Members have voted that agency business requires that this matter be added to the agenda for the Board's July 15, 1977, meeting and that no earlier announcement of the change was possible:

Chairman Alfred E. Kahn
Vice Chairman Richard J. O'Melia
Member G. Joseph Minetti

Member Lee R. West was not present and did not vote.

[S–918–77 Filed 7–15–77;9:35 am]

[1] The ratification process provides an entry in the Board's Minutes of items already adopted by the Board through the written Notation process (memoranda circulated to the Members sequentially). A list of items ratified at this meeting will be available in the Board's Public Reference Room (Room 710, 1825 Connecticut Avenue NW., Washington, D.C. 20428) following the meeting.

2

FEDERAL COMMUNICATIONS COMMISSION.

TIME AND DATE: 9:30 a.m., Tuesday, July 19, 1977.

PLACE: Room 856, 1919 M Street NW., Washington, D.C.

STATUS: Special Open Commission Meeting.

CHANGES IN THE MEETING: The following agenda item should be deleted:

Agenda, Item No., and Subject

* * * * *

Special—2—Briefing in International Telecommunications Proposals.

CONTACT PERSON FOR MORE INFORMATION:

Samuel M. Sharkey, FCC Public Information Officer, telephone number 202–632–7260.

Issued: July 14, 1977.

[S–928–77 Filed 7–15–77;2:17 pm]

3

FEDERAL ELECTION COMMISSION.

DATE AND TIME: Thursday, July 21, 1977, at 10 a.m.

PLACE: 1325 K Street, NW., Washington, D.C.

STATUS: Portions of this meeting will be open to the public and portions will be closed to the public.

MATTERS TO BE CONSIDERED:

Portions open to the public:

I. Future meetings.
II. Correction and approval of minutes for July 7, 1977.
III. Advisory opinions: AO 1977–16; AO1977–26; AO 1977–30.
IV. Policy memorandum on candidate status:
V. Appropriations and budget.
VI. Pending legislation.
VII. Liaison with other Federal agencies.
VIII. Report on pending litigation.
IX. Routine administrative matters.

Portions closed to the public: (Executive Session): Compliance; Personnel.

PERSON TO CONTACT FOR INFORMATION:

David Fiske, Press Officer, telephone: 202–523–4065.

MARJORIE W. EMMONS,
Secretary to the Commission.

[S–915–77 Filed 7–14–77;3:42 pm]

4

FEDERAL POWER COMMISSION.

"FEDERAL REGISTER" CITATION OF PREVIOUS ANNOUNCEMENT: To be published July 18, 1977.

PREVIOUSLY ANNOUNCED TIME AND DATE OF MEETING: July 20, 1977, 10 a.m.

CHANGE IN THE MEETING: The following items have been added:

Item No., Docket No., and Company

P–11.—ER–77–487, Toledo Edison Company.
G–13.—RP73–107, RP74–90, and RP75–91, Consolidated Gas Supply Corporation.
G–14.—RP74–20 and RP74–83, United Gas Pipe Line Company.
G–15.—RP77–18, El Paso Natural Gas Company.
G–16.—RI76–35 and CI76–804, Continental Oil Company; RI76–51 and CI76–805, Cities Service Oil Company; RI76–42 and CI76–802, Getty Oil Company.
G–17.—CI77– , Gulf Oil Corporation.
G–18.—CI77–93, Monsanto Company, et al.
G–19.—CP71–68, Columbia LNG Corporation. CP71–153, Consolidated System LNG Company. CP71–151, Southern Energy Company.
G–20.—CP75–295, Texas Gas Transmission Corporation.
G–21.—CP74–322, Michigan Gas Storage Company; CP75–3, Trunkline Gas Company; CI74–738, Northern Michigan Exploration Company.

G-22.—RP77-103, Algonquin Gas Transmission Company.

KENNETH F. PLUMB,
Secretary.

[S-917-77 Filed 7-15-77;9:35 am]

5

MISSISSIPPI RIVER COMMISSION.

TIME AND DATE: Beginning at 9 a.m., July 28, 1977, and adjourning 12 noon, July 29, 1977.

PLACE: 1400 Walnut Street, Vicksburg, Mississippi.

STATUS: Open to the public for observation but not for participation.

MATTERS TO BE CONSIDERED:

Reports of the Commission staff on:

(1) Current river conditions;
(2) Inspection of the east shoreline of the Mississippi River south of Mayfield Creek, Kentucky;
(3) Inspection of the west bank of the Mississippi River near the SEMO grain elevator in Missouri;
(4) Marking dikes in the Mississippi River;
(5) Ground cover for levees and berms;
(6) Shaping of spoil banks and drainage of borrow pits;
(7) Drop structures and welts in streams;
(8) Upper Pointe Coupe Flood Control Project;
(9) Incorporation of the East Bank Levee below Pointe-a-la-Hache into the Mississippi River Levee system;
(10) Inspection of the riverbank near River Ridge, Louisiana, with regard to high-water mark and Corps of Engineers' jurisdiction;
(11) Mitigation report for Tensas-Cocodrie Pumping Plant in Louisiana.

CONTACT PERSON FOR MORE INFORMATION:

Mr. Rodger D. Harris, telephone 601-636-1311, extension 2705.

[S-919-77 Filed 7-5-77;9:35 am]

6

PAROLE COMMISSION.

TIME AND DATE: Tuesday, July 26, 1977, 9 a.m.

PLACE: U.S. Tax Court, 400 2nd St. N.W., Washington, D.C., Ceremonial Courtroom, 3rd floor.

STATUS: Closed.

MATTERS TO BE CONSIDERED:

Consideration by the Commission of approximately 20 cases determined to be Original Jurisdiction pursuant to a reference under 28 CFR § 2.17 and/or appealed pursuant to 28 CFR § 2.27. These are all cases originally heard by examiner panels wherein inmates of Federal Prisons have applied for parole or are contesting revocation of parole or mandatory release.

CONTACT PERSON FOR MORE INFORMATION:

Lee H. Chait, Case Analyst, 202-724-3094.

[S-920-77 Filed 7-15-77;11:29 am]

7

PAROLE COMMISSION.

TIME AND DATE: Wednesday, July 27, 1977, at 9 a.m.

PLACE: U.S. Tax Court, 400 2nd St. NW., Washington, D.C., Ceremonial Courtroom, 3rd floor.

STATUS: Closed.

MATTERS TO BE CONSIDERED:

1. Approval of minutes of closed meetings of May 27 and June 23, 1977.
2. Consideration and approval or further modification of fiscal year 1979 budget submission for Office of Management and Budget and the Congress; and for such other elements of fiscal planning and action as may be required including any remaining open items connected with the 1978 supplemental budget.
3. Consideration of internal personnel rules, practices and policies as impacting on specific employees.
4. Consideration of two applications for exemptions from a bar imposed by 29 U.S.C. 1111 against the employment of applicants by certain employee benefit plans; following hearings held pursuant to the Administrative Procedures Act and recommended decisions based thereon and/or no objection from the Labor Department to granting the exemption.

CONTACT PERSON FOR MORE INFORMATION:

Peter B. Hoffman, 202-724-3097.

[S-921-77 Filed 7-15-77;11:29 am]

8

PAROLE COMMISSION.

TIME AND DATE: Thursday, July 28, 1977, 9 a.m.

PLACE: U.S. Tax Court, 400 2nd St. NW., Washington, D.C., Ceremonial Courtroom, 3rd floor.

STATUS: Open.

MATTERS TO BE CONSIDERED:

1. Approval of minutes of open meeting held on May 25, 1977 and adjourned to the morning of May 27, 1977.
2. Consideration of public comment for following proposed amendments to rules in 28 CFR Part 2:

a. § 2.54(b)—Allowing review of any decision by the full Commission.

b. § 2.25—Expanding upon present grounds for administrative appeals and directing appellants to merits of case.

c. Sections regarding holding hearings—Holding hearings and setting presumptive release dates within 120 days of each inmate's confinement.

3. Revision of greatest severity guideline category to provide subcategories.
4. Revision of 28 CFR Sec. 2.1(c)(d) to designate Vice Chairman as Chairman of the NAB and the National Commissioners.
5. Original Jurisdiction Cases.

a. Clarification of procedure for reopening such cases.

b. Clarification of procedure for designating and declassifying such cases.

c. Suggested referral format—general.

6. Referrals under 28 CFR 2.24.

a. Suggested referral format—general.

b. Procedure regarding referral of revocations and preparation of Notices of Action.

7. New offense severity table—proposed prospective or retroactive application.
8. Clarify procedures and Commission action to be taken regarding misconduct reports.
9. Procedures regarding service of summonses.
10. Proposed unified disclosure system as a new Alternate Means of Access under the Privacy Act and related statutes.
11. Consideration of Bureau of Prisons Drug Abuse In-Care and Aftercare manuals and commentary.
12. Reporting to Commission meetings by Commissioners.
13. Develop policy for attendance by Commissioners at professional meetings.
14. Issuance of subpoenas for certain appearances of probation officers.
15. Consideration of request for release of data tape.
16. Statistical Report.
17. Specificity of reasons for decisions outside of the guidelines.
18. Legal Report.
19. Legal Assistance proposed to be provided by law students.
20. Meetings—Consideration of location and costs.
21. Use of covering letters with Commission correspondence.
22. *Supplemental Warrants.* Proposal to discontinue sending applications for supplemental warrants to the FBI.
23. *Lists of intelligence personnel.* Proposal to exchange such lists for information purposes with Department of Justice.
24. *Original Jurisdiction references.* Proposal to contact Department of Justice when certain cases are referred, and to set up employee coferences with the Department.
25. *Waiver.* Proposed waiver of hearing at the ⅔ point in serving a sentence.
26. *Modification of sentence.* Proposal to oppose any such modifications made after the 120 day period provided by Court Rules.

CONTACT PERSON FOR MORE INFORMATION:

Peter B. Hoffman, 202-724-3097.

[S-922-77 Filed 7-15-77;11:29 am]

9

RAILROAD RETIREMENT BOARD.

"FEDERAL REGISTER" CITATION OF PREVIOUS ANNOUNCEMENT: 42 FR 36067, July 13, 1977.

PREVIOUSLY ANNOUNCED TIME AND DATE OF THE MEETING: 10 a.m., July 20, 1977.

CHANGES IN THE MEETING:

Additional item to be considered at the portion of the meeting open to the public:

(15) Effect of vacancies in Board Member positions on the authority of the Board.

[S-914-77 Filed 7-14-77;12:48 pm]

10

SECURITIES AND EXCHANGE COMMISSION.

"FEDERAL REGISTER" CITATION OF PREVIOUS ANNOUNCEMENT: 42 FR 36073, July 13, 1977.

PREVIOUS ANNOUNCED TIME AND DATE: July 14, 1977, 10 a.m.

PLACE: Room 825, 500 North Capitol Street, Washington, D.C.

STATUS: Closed meeting.

CHANGES IN THE MEETING:

An additional item was considered by the Commission at the closed meeting regarding the impact on securities market of the New York City blackout.

Chairman Williams, Commissioners Loomis, Evans, and Pollack determined that Commission business required consideration of the matter and that no earlier notice thereof was possible.

JULY 14, 1977.

[S-916-77 Filed 7-14-77;3:42 pm]

federal register

TUESDAY, JULY 19, 1977
PART II

DEPARTMENT OF DEFENSE

Department of the Army, Engineers Corps

■

REGULATORY PROGRAM OF THE CORPS OF ENGINEERS

Title 33—Navigation and Navigable Waters

CHAPTER II—CORPS OF ENGINEERS, DEPARTMENT OF THE ARMY

Regulatory Programs of the Corps of Engineers

AGENCY: U.S. Army Corps of Engineers, DoD.

ACTION: Final rules.

SUMMARY: We are revising and reorganizing all regulations governing the permit programs of the Corps of Engineers. The new format is designed to make the policies and procedures more understandable to a person desiring to perform work in the waters of the United States. The Section 404 program (discharging dredged or fill material into the water) is being revised to clarify many terms and to provide for the issuance of nationwide permits. The new regulations should enable a person to get a quicker decision on his application. In the case of nationwide permits, no application at all is required.

EFFECTIVE DATE: July 19, 1977.

FOR FURTHER INFORMATION CONTACT:

Mr. Curtis Clark or Mr. Bernie Goode, Regulatory Functions Branch, phone: 202-693-5070 or Mr. William Hedeman, Chief Counsels Office, phone: 202-693-6169.

SUPPLEMENTARY INFORMATION: Because of the rapidly changing nature of the Corps' regulatory programs, we have prefaced this supplementary information with a historical background discussion.

HISTORICAL BACKGROUND

The Department of the Army, acting through the Corps of Engineers, is responsible for administering various Federal laws that regulate certain types of activities in specific waters in the United States and the oceans. The authorities for these regulatory programs are based primarily on various sections of the River and Harbor Act of 1899 (33 U.S.C. 401 et seq.), Section 404 of the Federal Water Pollution Control Act Amendments of 1972 (33 U.S.C. 1344) and Section 103 of the Marine Protection, Research and Sanctuaries Act of 1972 (33 U.S.C. 1413). Each of these laws will be discussed in further detail below.

THE RIVER AND HARBOR ACT OF 1899

Until recently, the regulatory programs of the Corps of Engineers were administered only pursuant to various sections in the River and Harbor Act of 1899. These include: Section 9 (33 U.S.C. 401); Section 10 (33 U.S.C. 403); Section 11 (33 U.S.C. 404); and Section 13 (33 U.S.C. 407).

Section 9 requires a permit from the Corps of Engineers to construct any dam or dike in a navigable water of the United States. The consent of Congress is also required if the navigable water is interstate, and the consent of the appropriate state legislature is required if the water is intrastate. Bridges and causeways constructed in navigable waters of the United States also require permits under Section 9, but the authority to issue these permits was transferred to the U.S. Coast Guard in 1966 when the Department of Transportation was created.

Section 10 identifies other types of structures or work in or affecting navigable waters of the United States that are prohibited unless permitted by the Corps of Engineers. However, unlike Section 9, the consent of Congress or a State legislature is not required. Section 10 requires permits from the Corps for structures in navigable waters such as piers, breakwaters, bulkheads, revetments, power transmission lines, and aids to navigation. It also requires permits for various types of work performed in navigable waters, including dredging and stream channelization, excavation and filling. In addition, any work that is performed outside the limits of a navigable water which affects its navigable capacity may also require a Section 10 permit.

The 1899 Act was enacted to protect navigation and the navigable capacity of the nation's waters. Section 11 focuses on this basic concern by allowing the Secretary of the Army to establish harbor lines landward of which piers, wharves, bulkheads, and other structures or work could be built or performed without a Corps permit. However, as will be noted below, these harborlines now serve only as guides to defining the offshore limits of these activities from the standpoint of their impact on navigation. They can no longer be relied upon as a substitute for the requirement to obtain a permit under the 1899 Act.

Violation of the provisions and requirements of Section 9, 10, or 11 of the 1899 Act can result in criminal prosecution. Section 12 specifies criminal fines that range between $500 and $2,500 per day of violation and/or imprisonment, either or both of which may be imposed upon conviction. In addition, Section 12 also provides for injunctive relief that may be sought by the United States to respond to violations of these Sections, including the restoration of the area to its original condition. See *U.S.* v. *Moretti*, 478 F. 2d 418 (5th Cir. 1975).

Until 1968, the Corps administered the 1899 Act regulatory program only to protect navigation and the navigable capacity of the nation's waters. The permit requirements of the Act were limited in their application to waters that were presently used as highways for the transportation of interstate or foreign commerce.

On December 18, 1968, the Department of the Army revised its policy with respect to the review of permit applications under Sections 9 and 10 of the 1899 Act. It published in the FEDERAL REGISTER a list of additional factors besides navigation that would be considered in the review of these applications. These included: fish and wildlife; conservation; pollution; aesthetics; ecology; and the general public interest. (33 CFR 209.120.)

The 1968 change in policy identified this new type of review as a "public interest review." It was adopted in response to a growing national concern for environmental values as they related to our nation's water resources and in response to related Federal legislation, such as the Fish and Wildlife Coordination Act (16 U.S.C. 661 et seq.), that required the consideration of some of these concerns in Federal decision-making. Enactment of the National Environmental Policy Act on January 1, 1970 (42 U.S.C. 4331 et seq.) gave further support to this change in policy.

The "public interest review" received its first judicial test in the case of *Zabel* v. *Tabb*, 430 F. 2d 199 (15th Cir. 1970), cert. den. 401 U.S. 910 (1972) in which the Court upheld the denial by the Corps of a landfill permit for fish and wildlife reasons (and not reasons related to navigation). In reaching this decision, the Court reaffirmed the Department of the Army's position that it was "acting under a Congressional mandate to collaborate and consider all of these factors" when it reached that decision.

In further response to the adoption of this public interest review, the Department of the Army revised its harborline regulation (33 CFR 209.150) on May 27, 1970. This revision made it clear that permits were required for any work commenced landward of an established harborline after May 27, 1970, and that these permit applications would receive a full public interest review. Of course, navigation concerns in this public interest review will be guided, in large part, by the presence of established harborlines.

During 1972, the Corps of Engineers reviewed all judicial decisions in which the term "navigable waters of the United States" had been interpreted in order to identify all waters to which Sections 9 and 10 of the 1899 Act could be applied. This analysis was made in response to the Federal government's growing concern over the protection of the nation's water resources and the need to protect those resources through the full mandate of available Federal laws.

On September 9, 1972, the Corps of Engineers published an administrative definition of the term "navigable waters of the United States" in the FEDERAL REGISTER (subsequently codified as 33 CFR 209.260). This definition was intended for use in the Corps' administration of Sections 9 and 10 of the 1899 Act, and included the following: (1) all waters presently used to transport interstate or foreign commerce (see *Daniel Ball* v. *United States*, 77 U.S. 557 (1871)); (2) all waters used in the past to transport interstate of foreign commerce (see *Economy Light and Power Company* v. *United States*, 256 U.S. 113 (1921)); all waters susceptible to use in their ordinary condition or by reasonable improvement to transport interstate or foreign commerce (see *United States* v. *Appalachian Electric Power Co.*, 311 U.S. 377 (1940)); and all waters subject to the ebb and flow of the tide (see *United States* v. *Moretti*, *supra*). The landward limit of this jurisdiction for freshwater was established as the ordinary high water mark and the shore-

ward limit for tidal water was established as the mean high water mark (mean higher high water mark on the West Coast).

On April 4, 1974, the Corps of Engineers published final revisions to its permit regulation (33 CFR 209.120) (Proposed revisions were published for interim guidance on May 10, 1973). These revisions were made for the following reasons:

a. To incorporate new permit programs established under Section 404 of the FWPCA and Section 103 of the MPRSA (discussed in more detail below);

b. To incorporate the requirements of new Federal legislation related to the review of the Federal permit applications, including: other sections of the FWPCA and the MPRSA; the National Environmental Policy Act of 1969, and the Coastal Zone Management Act of 1972, as amended (16 U.S.C. 1451 et seq.).

c. To adopt additional factors of concern in the public interest review, in response to this related legislation, including, in addition to those previously announced, the following: economics, historic values, flood damage prevention, land use classification, recreation, water supply, and water quality.

d. To adopt criteria that would also be considered in the evaluation of each permit application including the desirability of using appropriate alternatives; the extent and permanence of the beneficial and/or detrimental effects of the proposed activity; and the cumulative effect of the activity when considered in relation to other activities in the same general area;

e. To adopt a wetlands policy that would protect wetlands within the Corps jurisdiction from unnecessary destruction; and

f. To implement procedures that insured compliance with these new statutory and policy review requirements.

As previously noted, regulations have been published throughout the past years to implement Sections 9, 10, 11, and 13 of the 1899 Act. These regulations have all been included in Part 209 of Title 33 of the Code of Federal Regulations as follows:

a. 209.120. Permits for Activities in Navigable Waters and Ocean Waters.
b. 209.125. Dams and Dikes Across Waterways.
c. 209.131. Permits for Discharges of Deposits into Navigable Waters.
d. 209.150. Harbor Lines.
e. 209.260. Definition of Navigable Waters of the United States.

THE REFUSE ACT PERMIT PROGRAM

On April 7, 1971 the Corps of Engineers implemented the first nationwide program to regulate the discharge of pollutants into the nation's awters. Authority for this permit program was based on Section 13 of the River and Harbor Act of 1899 (33 U.S.C. 407), commonly referred to as "The Refuse Act", which prohibits the discharge of "refuse matter" into navigable waters of the United States or their tributaries, or onto the banks of such waters if the "refuse matter" is likely to be washed into a navigable water. Regulations to implement this permit program were published in 33 CFR 209.131. On December 24, 1971, the permit program was enjoined by the District Court for the District of Columbia in the case of *Kalur v. Resor*, 335 F. Supp. 1, (D.D.C. 1971).

The Refuse Act permit program remained suspended until October 18, 1972, when Congress enacted the FWPCA. Section 402 of the FWPCA established the National Pollutant Discharge Elimination System program, which subsumed the Refuse Act permit program. Section 402(a)(5) provides that no permits may be issued under Section 13 of the 1899 Act for discharges into waters of the United States after 18 October 1972. However, the Refuse Act prohibitions can only be lifted by the issuance of an NPDES permit, and the Refuse Act remains a viable Federal enforcement mechanism for the discharge of pollutants into these waters without such a permit.

SECTION 404 OF THE FWPCA

On October 18, 1972, Congress enacted the Federal Water Pollution Control Act Amendments of 1972 with the announced purpose of restoring and maintaining the chemical, physical, and biological integrity of the Nation's waters. The FWPCA established a number of goals, requirements, prohibitions, and programs to achieve this purpose, and addressed the problems of water pollution by using many different approaches. The Amendments provide Federal financial assistance for major research and demonstration projects and the construction of publicly owned waste treatment works. They also provide programs to deal with various sources and types of pollution, including toxic, oil, and hazardous substances. Section 208 of the Act provides for the development and implementation of areawide waste treatment management planning processes to control all sources of pollution.

Section 301 of the FWPCA prohibits the discharge of pollutants from discernible conveyances (defined as "point sources") into "navigable waters", (defined in the FWPCA as "the waters of the United States, including the territorial seas"), unless the discharge is in compliance with Section 402 or 404 of the Act. As noted above, Section 402 establishes the National Pollutant Discharge Elimination System to regulate industrial and municipal point source discharges of pollutants into the Nation's waters. The NPDES permit program is administered by the Administrator of the Environmental Protection Agency, and provides an opportunity for the Administrator to transfer this responsibility to those States that have the authority and capability to assume responsibility for the administration of the NPDES program.

Section 404 of the FWPCA establishes a permit program, administered by the Secretary of the Army, acting through the Chief of Engineers, to regulate the discharge, into the waters of the United States, of dredged material and of those pollutants that comprise fill material. Applications for Section 404 permits are evaluated by using guidelines developed by the Administrator of EPA, in conjunction with the Secretary of the Army (See 40 CFR 230). The Chief of Engineers can make a decision to issue a permit that is inconsistent with those guidelines if the interests of navigation require. Section 404(c) gives the Administrator, EPA, further authority, subject to certain procedures, to restrict or prohibit the discharge of any dredged or fill material that may cause an unacceptable adverse effect on municipal water supplies, shellfish beds and fishery areas (including spawning and breeding areas), wildlife, or recreational areas.

Violation of the prohibition specified in Section 301 of the FWPCA against discharging pollutants into the waters of the United States without a required permit under Section 402 or 404, or permit conditions, or of other requirements of the FWPCA, can result in civil fines of not more than $10,000 per day of violation, criminal fines of up to $50,000 per day of violation, imprisonment, and/or injunctive relief, including restoration of the area to its original condition. The exact provisions for Federal enforcement of the FWPCA are established in Section 309. (33 U.S.C. 1319).

As part of the revisions to its April 3, 1974 permit regulation, the Department of the Army published regulations to implement the Section 404 permit program. These regulations limited the Section 404 permit program to the same waters that were being regulated under the River and Harbor Act of 1899: waters that are subject to the ebb and flow of the tide shoreward to their mean high water mark (mean higher water mark on the West Coast) and/or waters that are presently used, were used in the past, or are susceptible to use to transport interstate or foreign commerce.

The Natural Resources Defense Council and the National Wildlife Federation challenged this limitation on the jurisdiction of Section 404 as being inconsistent with the intent of Congress to regulate "all waters of the United States," as expressed in the FWPCA's definition of "navigable waters." Concern was expressed over the need to regulate the entire aquatic system, including all of the wetlands that are part of it, rather than only those aquatic areas that are arbitrarily distinguished by the presence of an ordinary or mean high water mark. (A major portion of the coastal wetlands are above the mean high water mark and were outside the permit review requirements of Section 404 by this interpretation.) Concern was expressed over the need to regulate the many tributary streams that feed into the tidal and commercially navigable waters (all of which were subject to regulation under the Refuse Act and NPDES programs) since the destruction and/or degradation of the physical, chemical, and biological integrity of each of these waters is threatened by the unregulated discharge of dredged or fill material. And concern was expressed for the many

other waters, including lakes, isolated wetlands, and potholes whose degradation, destruction, and disappearance continues to increase at alarming rates.

On March 27, 1975, the District Court for the District of Columbia ordered the revocation and rescission of that part of the Department of the Army's regulation "which limits the permit (Section 404) jurisdiction of the Corps by definition or otherwise to other than the waters of the United States." The Court further ordered publication of proposed regulations within 15 days (later amended to 40 days) which clearly recognized the full regulatory mandate of the FWPCA with respect to Section 404, and final regulations within 30 days of the date of the order (later amended to 80 days). *NRDC* v. *Callaway*, 392 F. Supp. 685 (D.D.C. 1975).

Responding to this court order, the Corps published four alternative proposed regulations in the FEDERAL REGISTER for comment on May 6, 1975. Over 4,500 comments were received in response to these proposed regulations. Many of these comments assisted the Corps in developing an administrative definition of "navigable waters" that was consistent with the intent and objectives of the FWPCA, and also in developing a program that was responsive to many of the concerns raised by the comments.

On July 25, 1975, the Corps of Engineers published an interim final regulation in the FEDERAL REGISTER. The interim final regulation essentially melded revisions to the Section 404 program into the previously published April 3, 1974 regulation. It included administrative definitions of "navigable waters", "dredged material", and "fill material", and procedural mechanisms to avoid unnecessary duplicative review in those states that have permit programs similar to Section 404.

The interim final regulation administratively defined the term "navigable waters" to include: coastal waters, wetlands, mudflats, swamps, and similar areas; freshwater lakes, rivers, and streams that are used, were used in the past, or are susceptible to use to transport interstate commerce, including all tributaries to these waters; interstate waters; certain specified intrastate waters, the pollution of which would affect interstate commerce; and freshwater wetlands, including marshes, shallows, swamps, and similar areas that are contiguous or adjacent to the above described lakes, rivers, and streams, and that are periodically inundated and normally characterized by the prevalence of vegetation that requires saturated soil conditions for growth and reproduction.

The regulation also specified that permits would not be required for discharges beyond the "headwaters" of a river or stream unless the interests of water quality required assertion of jurisdiction above the headwaters. "Headwaters" was defined as "the point on the stream above which the flow is normally less than 5 cubic feet per second * * *."

Any material that is excavated or dredged from a water of the United States and reintroduced into a water of the United States is considered to be the "discharge of dredged material" for purposes of Section 404.

"Fill material" was defined to include the following activities: the creation of fastlands, elevations of land beneath waters of the United States, or impoundments; the building of any structure or impoundment requiring rock, sand, dirt, or other pollutants for its construction; site-development fills; causeway or roadfills; dams and dikes; artificial islands; property protection and/or reclamation devices such as riprap, groins, and breakwaters; beach nourishment; levees; and backfill for various structures and utility lines.

The regulation also identified certain types of activities that were excluded from the program because they do not involve the discharge of dredged or fill material into water. Plowing, seeding, cultivating, and harvesting for the production of food, fiber, and forest products were included in this list of excluded activities. Also excluded from the program was material placed for maintenance and emergency reconstruction of existing fills.

The July 25 regulation adopted a phase-in schedule to implement the permit requirements of Section 404 for discharges in the above defined waters, and also included authority for District Engineers to issue general permits for those discharges that cause only a minor individual and cumulative impact to the environment. Phase I began immediately upon publication of the regulation, and included all waters subject to the ebb and flow of the tide and/or waters that are, were, or are susceptible to use for commercial navigation purposes (waters already being regulated by the Corps) plus all adjacent wetlands to these waters (thus eliminating the artificial ordinary high water and mean high water mark distinctions). Phase II became effective on September 1, 1976 (originally scheduled for July 1, 1976, but postponed for 60 days by Presidential action), and included primary tributaries to the Phase I waters and lakes greater than five acres in surface area, plus wetlands adjacent to these waters. Phase III, requiring permits for discharges of dredged or fill material into all waters of the United States, became effective on July 1, 1977. Discharges that occur in a particular waterbody before a scheduled phase-in date are permitted by the regulation, subject to six specified conditions. Also permitted by the regulation are certain minor discharges, again subject to the same conditions.

Various policies and procedures were also included in this regulation to allow joint review and processing of applications for Section 404 permits in those states with programs similar to Section 404.

On September 5, 1975, EPA published interim final guidelines to be used in the evaluation of proposed discharges of dredged or fill material. These interim guidelines are published in 40 CFR Part 230.

A number of courts have had occasion to consider whether particular waters, including wetlands, are "waters of the United States" within the scope of the FWPCA. The first case to address whether wetlands beyond the mean high water mark of traditional navigable waters of the United States were subject to the FWPCA was *United States* vs. *Holland*, 373, F. Supp. 665 (M.D. Fla., 1974) in which the Court held:

> The court is of the opinion that the mean high waterline is no limit to Federal authority under the FWPCA. While the line remains a valid demarcation for other purposes, it has no rational connection to the aquatic ecosystems which the FWPCA is intended to protect. Congress has wisely determined that Federal authority over water pollution properly rests on the commerce clause and not on past interpretations of an act designed to protect navigation. And the Commerce clause gives Congress ample authority to reach activities above the mean high water line that pollute the waters of the United States.

Other Courts have pursued the same theme, and often use the Holland rationale to support their position. These include the following: *United States* v. *Ashland Oil and Transportation Co.*, 504 F2d 1317 (6th Cir. 1974), involving discharges of oil into a tertiary tributary to a navigable water of the United States; *United States* v. *P.F.Z. Properties, Inc.*, 393 F. Supp. 1370, 1381 (D.D.C. 1975) and *Leslie Salt* v. *Froehlke*, 403 F. Supp. 1292, 1296–1297 (N.D. Cal. 1974)—each involving discharges of dredged or fill material into navigable waters of the United States; *Conservation Council of North Carolina* v. *Costanzo*, 398 F. Supp. 653, 673 (E.D. N.C. 1975); *United States* v. *Smith*, 7 ERC 1936, 1938–1939 (E.D. Va., 1975); *United States* v. *Golden Acres, Inc.*, No. 76–0023–CIV–4, slip opinion p. 5–6 (E.D. N.C., Jan. 13, 1977); *United States* v. *Riverside Bayview Homes, Inc.*, Civil Action No. 77–76041 (E.D. Mich., Feb. 24, 1977)—all involving discharges into wetlands adjacent to navigable waters of the United States or a primary tributary thereof in which the wetland area is located above the mean high tide line or ordinary high water mark but is still periodically inundated and covered with aquatic vegetation; and *United States* v. *Byrd and Elder*, ERC 1275 (N.D. Ind., August 13, 1976) involving the discharge of fill material into a natural freshwater lake.

SECTION 103 OF THE MARINE PROTECTION, RESEARCH AND SANCTUARIES ACT OF 1972

Five days after enactment of the FWPCA, Congress enacted the Marine Protection, Research and Sanctuaries Act of 1972 (33 U.S.C. 1413). This Act, commonly referred to as the "Ocean Dumping Act", has many provisions that resemble the approach taken by the FWPCA to regulate activities that can pollute or otherwise adversely affect the ocean waters.

Section 102 of the Act vests authority in the Administrator, EPA, to issue permits, after notice and opportunity for public hearing, for the transportation from the United States of material that is intended to be dumped in ocean waters. "Material" is defined in the Act to include most liquid, solid, or suspended solid substances. Before issuing a permit,

the Administrator is required to determine that the proposed dumping will not unreasonably degrade or endanger human health, welfare or amenities, or the marine environment, ecological systems or economic potentialities. The Act also requires him to establish ocean dumping criteria to be used in making this evaluation.

Section 103 of the Ocean Dumping Act is similar to Section 404 of the FWPCA in that it creates a separate permit program to be administered by the Secretary of the Army, acting through the Chief of Engineers, to regulate the ocean dumping of dredged material. The Act requires the Corps of Engineers to make the same evaluation that is required of the Administrator for the ocean dumping of other materials, and to make this evaluation, by using the ocean dumping criteria developed by the Administrator. The Act also requires the Corps of Engineers to utilize ocean dumping sites that have been designated by the Administrator, EPA, to the maximum extent feasible.

If the EPA criteria prohibit ocean dumping, the Act requires the Corps of Engineers to make an independent determination as to the need for the proposed dumping based upon an evaluation of the potential affect that would occur to navigation, economic and industrial development, and foreign and domestic commerce of the United States if a permit were denied. An independent determination as to other proposed methods of disposal of dredged materials and appropriate locations for ocean dumping must also be made by the Corps of Engineers in the review of applications for ocean dumping.

No permit may be issued to dump dredged material in the oceans if the dumping does not comply with the EPA criteria unless the Secretary of the Army seeks a waiver of the criteria from the Administrator after certifying that there is no economically feasible method or site available other than the proposed dump site under consideration. The Act requires the Administrator to grant this waiver unless he finds that the proposed dumping will result in an unacceptable adverse impact on municipal water supplies, shellfish beds, wildlife, fisheries, or recreational areas.

The EPA criteria for evaluating the ocean dumping of all material, including dredged material, are published in 40 CFR Parts 220–228. These criteria were revised by EPA, and the revisions are published in the FEDERAL REGISTER dated 11 January 1977 (42 FR 2462).

Violation of any provision or requirement of the Ocean Dumping Act can result in criminal or civil penalties of not more than $50,000 per day of violation, imprisonment, and legal actions to enjoin imminent or continuing violations of the Act.

REVISIONS TO REGULATIONS

The Corps of Engineers published its July 25, 1975 regulation as an interim final regulation, and provided a comment period of 90 days in which interested members of the public could comment further on the regulation before it was finalized. Today, we are finalizing that regulation. We wish to take this opportunity to thank again those 2,000 individuals, government officials, special interest groups, and companies who responded to this opportunity for additional comment. Many of you will find that your suggestions have been developed in the revisions to our regulation.

In addition to the 2,000 comments received on the interim final regulation, the Corps of Engineers held four nationwide public hearings on the Section 404 program and 243 information meetings that have assisted us in these revisions.

We now have almost two years of experience in administering the Section 404 program as revised by the July 25, 1975 regulation, and over three years of experience in the administration of our other permit programs since publication of the April 3, 1974 regulation. This experience has revealed some problem areas that require correction. Our District and Division offices have raised these concerns with us, and we have attempted to respond to these problems in revisions to the regulation.

One of the primary criticisms of the existing regulation was its length, organization and wordiness. We have responded to this concern by deleting redundant paragraphs, rewording sentences, and completely reorganizing the regulations. This includes a new format that incorporates related regulations into an orderly sequence.

Today, we are rescinding the following regulations:

a. 33 CFR 209.120, "Permits for Activities in Navigable Waters or Ocean Waters";
b. 33 CFR 209.125, "Dams and Dikes Across Waterways";
c. 33 CFR 209.131, "Permits for Discharges or Deposits into Navigable Waters";
d. 33 CFR 209.133, "Public Hearings";
e. 33 CFR 209.150, "Harbor Lines"; and
f. 33 CFR 209.260, "Definition of Navigable Waters of the United States."

We are also, today, publishing the following new regulations, each of which generally corresponds with one of the above cited regulations that is being rescinded. All regulations that pertain completely to the permit programs of the Corps of Engineers, are being published in a new series of Title 33 of the Code of Federal Regulations, and will be included in Parts 320 to 340. This new series is organized as follows:

a. Part 320, "General Regulatory Policies";
b. Part 321, "Permits for Dams and Dikes in Navigable Waters of the United States" (Section 9 of the River and Harbor Act of 1899);
c. Part 322, "Permits for Structures or Work in or Affecting Navigable Waters of the United States" (Section 10 of the River and Harbor Act of 1899);
d. Part 323, "Permits for Discharges of Dredged or Fill Material into Waters of the United States" (Section 404 of the FWPCA);
e. Part 324, "Permits for Ocean Dumping of Dredged Material" (Section 103 of the Marine Protection, Research and Sanctuaries Act of 1972);
f. Part 325, "Processing of Department of the Army Permits";
g. Part 326, "Enforcement";
h. Part 327, "Public Hearings";
i. Part 328, "Harbor Lines";
j. Part 329, "Definition of Navigable Waters of the United States";
k. Parts 330–339 (Reserved).

The following is an explanation of each new part of this regulation, including the reasons for significant changes that have been made. We will also respond to significant comments that were made in response to various provisions in this regulation.

PART 320

This Part describes the general and related statutory authorities that are used by the Corps of Engineers in administering the various permit programs to regulate activities in waters of the United States and the oceans. The part also describes the general policies that are used by the Corps in the review of each permit application, including: (1) The public interest review described above; and (2) policies on wetlands; fish and wildlife; water quality; historic, scenic, and recreational values; effects on limits of the territorial sea; interference with adjacent properties or Federal projects; and requirements for other Federal, State, or local permits or certifications. This part generally corresponds to the provisions in paragraphs (a), (b), (c), (f), and (g) (1), (3), (4), (5), (6), (10) and (18) of rescinded § 209.120.

We have added descriptions of each of the following Federal statutes to the list of "related legislation" in § 320.3 of this Part, since each of these laws is involved with or related to the review of applications for Federal permits. These include: The Endangered Species Act of 1973 (16 U.S.C. 1531 et seq.); The Deepwater Port Act of 1974 (33 U.S.C. 1501 et seq.); The Marine Mammal Protection Act of 1972 (16 U.S.C. 1361 et seq.); Section 7(a) of the Wild and Scenic Rivers Act (16 U.S.C. 1278 et seq.); and Section (f) of the Land and Water Conservation Fund Act of 1965 (16 U.S.C. 460*l*–4 et seq.).

In § 320.4(a), we have added three additional items to the list of factors that comprise our public interest review: Energy needs, safety, and food requirements.

Several modifications have been made to our wetlands policy in § 320.4(b). We identified those wetlands "whose destruction or alteration would affect detrimentally the natural drainage characteristics, sedimentation patterns, salinity distribution, flushing characteristics, current patterns or environmental characteristics," as one of the types of wetlands that is important to the public interest. (Previously this valuable wetlands function was only recognized if the wetlands that perform it were located next to the wetlands described in the first two subsections.) We also added to the list of functions those wetlands which through natural water filtration processes, serve to purify water. Finally, we have attempted to clarify our guidance on determining whether a particular wetlands

alteration is "necessary". The change now requires the District Engineer to consider whether the proposed activity "is primarily dependent on being located in or in close proximity to the aquatic environment and whether feasible alternative sites are available." Applicants are required to provide sufficient information to make this evaluation. We believe that this change more closely corresponds to the wetlands policy in the Section 404 Guidelines (40 CFR 230.5(b)(8)).

At the request of the Department of the Interior, we have added sites acquired under the Recreational Demonstrations Projects Act of 1942 (PL 77-594) to the types of sites for which the policy in § 320.4(e) on historic, scenic, and recreational values is applicable.

Clarifying language has been added to our policy in § 320.4(j) on other permits or certifications required for the same activity to ensure that it is applicable to all Federal, State and/or local permits or certifications. Under this policy, we will process permit applications concurrently (and in many cases we plan to do this jointly) with other required applications for Federal, State and/or local permits or certifications. If another required permit or certification is denied, we will not issue a permit.

To ensure that this policy cannot be used as a mechanism to delay decision-making on our permit application processing and decision-making, however, we also have modified it to allow the District Engineer to process a permit application to conclusion if the responsible government agency fails to take any definitive action to issue or deny its permit or certification within three months of our public notice.

We have added two new general policies to the review of all applications for permits. Section 320.4(k) includes a policy on the safety of impoundment structures that requires the District Engineer to condition permits for these types of structures to require the permittee to operate and maintain the structure properly to ensure public safety. This policy is not applicable, however, to impoundment structures for which an adequate safety inspection program is required or which are under the control of another Federal agency. Section 320.4(l) includes a policy on the review of permit applications in floodplains as required by the May 24, 1977 Executive Order 11988.

PART 321

This part describes the special policies and procedures that are followed in the review of applications for dams or dikes to be located in a navigable water of the United States. As noted above, this review is made under Section 9 of the River and Harbor Act of 1899 (33 U.S.C. 401). The general policies described in Part 320 and the general procedures described in Part 325 are also applicable to the review of these applications.

Part 321 replaces 33 CFR 209.125, which has been rescinded. We have defined the terms "navigable waters of the United States", "dam", and "dike" in this part to specify the types of waters to which Section 9 is applicable, and the type of structures that will require Section 9 permits. We anticipate that our administrative definitions of "dam" and "dike" in Section 321.2 will assist in distinguishing these types of structures from those that would otherwise be regulated under Section 10 of the River and Harbor Act of 1899.

In all other respects, the language in Part 321 resembles that in rescinded § 209.125.

PART 322

This part prescribes the special policies and procedures to be followed by the Corps in the evaluation of applications for structures or work in or affecting navigable waters of the United States pursuant to Section 10 of the River and Harbor Act of 1899. The general policies specified in Part 320.4 and the general procedures specified in Part 325 also are applicable to this evaluation. Furthermore, some of the activities that fall under this Part will also require permits under Section 404 of the FWPCA and Section 103 of the Ocean Dumping Act.

This Part corresponds to those sections of rescinded 33 CFR 209.120 that incorporated the Section 10 program. These include paragraphs (d)(1), (e) (1) and (4), and (g) (2) (7), (8), (9), (11), (13), (14), (15) and (16).

We have adopted administrative definitions of the terms "structure" and "work" to identify the types of activities that will require Section 10 permits (Sec. 322.2).

The 1975 regulation administratively "grandfathered" certain types of activities performed in navigable waters of the United States (see rescinded 33 CFR 209.120(g)(12)(vii)) and exempted others altogether from the need to obtain Section 10 permits (see rescinded 33 CFR 209.120(e)(1)). This latter category included the placement of aids to navigation by the U.S. Coast Guard and structures placed in artificial canals, the connection of which previously was authorized by a Section 10 permit.

Today, instead of again exempting or grandfathering these activities, we are permitting them through the issuance of nationwide permits that are incorporated into this regulation. We have also included other small structures in these nationwide permits that are often placed in navigable waters and have only a de minimus impact on the environment. We are issuing nationwide permits for these activities because we feel that this administrative device is preferable to those affected by it, and is a better administrative approach than relying on a "grandfathering" or "exemption" provision to satisfy the requirements of the 1899 Act.

The following activities are subject to these nationwide permits (see § 322.4):

1. The placement of aids to navigation by the U.S. Coast Guard;

2. Structures constructed in artificial canals within principally residential developments where the connection of the canal to a navigable water already has received a Section 10 permit;

3. Repair, rehabilitation, or replacement of any previously authorized, currently serviceable structure, or of any currently serviceable structure constructed prior to the requirement for a Seciton 10 permit (no deviation from original plans is authorized);

4. Marine life harvesting devices, such as pound nets, crab pots, eel pots, and lobster traps;

5. Staff and tidal gages, water recording devices, water quality testing and improvement devices, and similar scientific structures;

6. Survey activities including core sampling; and

7. Structures of work completed before December 18, 1968 (the date on which we adopted our public interest review) or in navigable waters over which the District Engineer has not asserted jurisdiction.

The nationwide permit imposes conditions on each of these structures, primarily to protect navigation.

Besides the nationwide permit, three other types of authorizations are used to issue Section 10 permits. These are:

1. Letters of permission—an individual permit issued following the abbreviated review procedures outlined in § 325.5(b);

2. Individual permits—permits issued following a case-by-case analysis of an application; and

3. General permits—permits issued for future minor work or structures in a particular region of the country that will have only minimal individual and cumulative impact on the environment.

We have included definitions of each of these terms in the regulation (§ 322.2). A person needing a Section 10 permit should first check to see whether the proposed project has already been permitted by a general permit or in this Part through a nationwide permit.

In all other respects, this regulation remains basically the same as published in 1975.

PART 323

This Part prescribes the special policies and procedures to be followed by the Corps in the evaluation of applications for permits to discharge dredged or fill material into the waters of the United States pursuant to Section 404 of the FWPCA. Again, as we have noted in Parts 321 and 322, the general policies specified in Part 320 and the general procedures specified in Part 325 also would be applicable to this evaluation. Furthermore, some of the activities that fall under Section 404 will also require permits under Sections 9 and 10 of the River and Harbor Act of 1899 (Parts 321 and 322).

This Part corresponds to those sections of the rescinded 33 CFR 209.120 that incorporated the Section 404 program. These include: paragraphs (d)(2), (4), (5), (6), (7) and (8) and (g)(17).

Section 404 provides that the Corps of Engineers may issue permits, after notice and opportunity for public hearing, for "discharges of dredged or fill material into navigable waters". The majority of comments received on the July 25, 1975 interim final regulation were in response to our definitions of terms "navigable waters", "dredged material", and "fill material".

The legislative history of the term "navigable waters" specified that it "be given the broadest constitutional interpretation unencumbered by agency determinations which have been made or may be made for administrative purposes." (H.R. Report No. 92-1465 at 144; A Legislative History of the FWPCA at p. 327). Article 1, Section 8 of the Constitution gives the Federal Government the authority "to regulate commerce with foreign Nations and among the several states." We have interpreted the guidance contained in this legislative history to be consistent with the Federal Government's broad constitutional power to regulate activities that affect interstate commerce as interpreted by the Supreme Court on several occasions. *Perez* v. *United States*, 402 U.S. 146 (1970); *Katzenbach* v. *McClung*, 379 U.S. 294 (1974); *Heart of Atlanta Motel, Inc.* v. *United States*, 379 U.S. 241 (1964); and *Wickard* v. *Filburn*, 317 U.S. 111 (1942).

Water pollution is one such activity, for as the Court stated in *U.S.* v. *Holland*, supra., "Congress has wisely determined that Federal authority over water pollution properly rests on the commerce clause. And the commerce clause gives Congress ample authority to reach activities * * * that pollute the waters of the United States." (See also the cases cited above on defining "waters of the United States" which affirmed the constitutionality of Congress' broad assertion of jurisdiction.)

We followed this basic premise in the development of our administrative definition of "navigable waters" for the July 25, 1975 regulation, and we have followed it again in our efforts to clarify that definition in this regulation.

Our definition of "navigable waters" in the 1975 regulation included the following:

(1) Coastal waters that are navigable waters of the United States subject to the ebb and flow of the tide, shoreward to their mean high water mark (mean higher high water mark on the Pacific coast);

(2) All coastal wetlands, mudflats, swamps, and similar areas that are contiguous or adjacent to other navigable waters. "Coastal wetlands" includes marshes and shallows and means those areas periodically inundated by saline or brackish waters and that are normally characterized by the prevalence of salt or brackish water vegetation capable of growth and reproduction;

(3) Rivers, lakes, streams, and artificial water bodies that are navigable waters of the United States up to their headwaters and landward to their ordinary high water mark;

(4) All artificially created channels and canals used for recreational or other navigational purposes that are connected to other navigable waters, landward to their ordinary high water mark;

(5) All tributaries of navigable waters of the United States up to their headwaters and landward to their ordinary high water mark;

(6) Interstate waters landward to their ordinary high water mark and up to their headwaters;

(7) Intrastate lakes, rivers and streams landward to their ordinary high water mark and up to their headwaters that are utilized:

(a) By interstate travelers for water-related recreational purposes;

(b) For the removal of fish that are sold in interstate commerce;

(c) For industrial purposes by industries in interstate commerce; or

(d) In the production of agricultural commodities sold or transported in interstate commerce;

(8) Freshwater wetlands, including marshes, shallows, swamps, and similar areas that are contiguous or adjacent to other navigable waters and that support freshwater vegetation. "Freshwater wetlands" means those areas that are periodically inundated and that are normally characterized by the prevalence of vegetation that requires saturated soil conditions for growth and reproduction; and

(9) Those other waters which the District Engineer determines necessitate regulation for the protection of water quality as expressed in the guidelines (40 CFR 230). For example, in the case of intermittent rivers, streams, tributaries, and perched wetlands that are not contiguous or adjacent to navigable waters identified in paragraphs (a)-(h), a decision on jurisdiction shall be made by the District Engineer.

Many suggested that we change the nomenclature of the term "navigable waters" and refer to our jurisdiction under Section 404 as "waters of the United States." This is the definition given to that term in Section 502(7) of the FWPCA. We have adopted this suggestion and feel that it will assist in distinguishing between the Section 404 program and the types of waters that are subject to the permit programs administered under Sections 9 and 10 of the 1899 Act.

We have consolidated the 1975 list of waters in our new definition to include four basic categories. We believe that this consolidation will assist in clarifying those waters that are subject to the Section 404 program.

CATEGORY 1

Coastal and inland waters, lakes, rivers, and streams that are navigable waters of the United States, including adjacent wetlands.—This category corresponds to those waters identified in sections (1), (2), (3), and (8) of the old definition. Through consolidation, we believe that many of the ambiguities raised in the old definition will be clarified.

The Federal government's authority to regulate all activities in or affecting navigable waters of the United States has always been recognized. As we have noted above, waters that fall within this category are also regulated under the River and Harbor Act of 1899. They include natural and artifical waters that are subject to the ebb and flow of the tide and/or that are used, were used in the past, or are susceptible to use to transport interstate or foreign commerce.

CATEGORY 2

Tributaries to navigable waters of the United States, including adjacent wetlands.—This category corresponds to sections (4), (5), (8), and (9) of the old definition.

The Federal government's authority to regulate activities on the rivers and streams that feed into navigable waters of the United States also has been historically recognized. As we noted in our historical background discussion, Section 10 of the River and Harbor Act of 1899 can be used to regulate activities outside the jurisdictional limits of navigable waters of the United States if those activities affect the navigable capacity of those waters. Section 13 of the 1899 Act also prohibits the dumping of any refuse matter into any tributary of a navigable water of the United States, or onto the banks of such waters where the material is likely to be washed into the water.

More recently, courts have recognized that the FWPCA is applicable to tributaries of navigable waters. In *U.S.* v. *Ashland Oil, supra*, the Court stated:

Pollution control of navigable streams can only be exercised by controlling pollution of their tributaries.

We have adopted the suggestion of many commenters that we incorporate into our definition (and not in the Preamble as we did in 1975) the statement that nontidal drainage and irrigation ditches that feed into navigable waters will not be considered "waters of the United States" under this definition. To the extent that these activities cause water quality problems, they will be handled under other programs of the FWPCA, including Sections 208 and 402.

CATEGORY 3

Interstate waters and their tributaries, including adjacent wetlands.—This category corresponds to those waters listed in sections (6) and (8) of the old definition.

The affects of water pollution in one state can adversely affect the quality of the waters in another, particularly if the waters involved are interstate. Prior to the FWPCA Amendments of 1972, most federal statutes pertaining to water quality were limited to interstate waters. We have, therefore, included this third category consistent with the Federal government's traditional role to protect these waters from the standpoint of water quality and the obvious effects on interstate commerce that will occur through pollution of interstate waters and their tributaries.

CATEGORY 4

All other waters of the United States not identified in Categories 1-3, such as isolated lakes and wetlands, intermittent streams, prairie potholes, and other waters that are not part of a tributary system to interstate waters or to navigable waters of the United States, the degradation or destruction of which could affect interstate commerce.—This category corresponds to sections (7), (8), and (9) of the old definition.

Waters that fall within categories 1, 2, and 3 are obvious candidates for inclusion as waters to be protected under the Federal government's broad powers to regulate interstate commerce. Other waters are also used in a manner that makes them part of a chain or connection to the production, movement, and/or use of interstate commerce even though they are not interstate waters or part of a

tributary system to navigable waters of the United States. The condition or quality of water in these other bodies of water will have an effect on interstate commerce.

The 1975 definition identified certain of these waters. These included waters used:

(1) By interstate travelers for water-related recreational purposes;
(2) For the removal of fish that are sold in interstate commerce;
(3) For industrial purposes by industries in interstate commerce; and
(4) In the production of agricultural commodities sold or transported in interstate commerce.

We recognized, however, that this list was not all inclusive, as some waters may be involved as links to interstate commerce in a manner that is not readily established by the listing of a broad category. The 1975 regulation, therefore, gave the District Engineer authority to assert jurisdiction over "other waters", such as intermittent rivers, streams, tributaries and perched wetlands, to protect water quality. Implicit in this assertion of jurisdiction over these other waters was the requirement that some connection to interstate commerce be established, even though that requirement was not clearly expressed in the 1975 definition.

We received many comments and criticisms concerning the waters covered in sections (7) and (9) of the 1975 definition, particularly with respect to uncertainty over the types of waters covered by section 9, and as to whether section 404 permits are required to discharge dredged or fill material into these latter waters.

We have responded to these comments by noting in the definition of these waters that they are the type, the degradation or destruction of which could affect interstate commerce. We have also incorporated an explanatory footnote at the end of this category which further explains this connection to interstate commerce.

We are responding to the concern of uncertainty over the need to obtain a permit in these waters by issuing today a nationwide permit for discharges into most of these waters. We believe that if the common sense conditions, guidelines and management practices provided in these nationwide permits are followed, the concern for water quality, as it affects the production, movement and/or use for interstate commerce, ordinarily will be satisfied with respect to these discharges.

Wetlands. Prior to enactment of the FWPCA, the mean tide line (mean higher tide line on the West Coast) was used to delineate the shoreward extent of jurisdiction over the regulation of most activities in tidal waters under the 1899 Act as well as for mapping, delineation of property boundaries, and other related purposes. In freshwater lakes, rivers and streams that are navigable waters of the United States, the landward limit of jurisdiction has been traditionally established at the ordinary high water mark.

The regulation of activities that cause water pollution cannot rely on these artificial lines, however, but must focus on all waters that together form the entire aquatic system. Water moves in hydrologic cycles, and the pollution of this part of the aquatic system, regardless of whether it is above or below an ordinary high water mark, or mean high tide line, will affect the water quality of the other waters within that aquatic system.

For this reason, the landward limit of Federal jurisdiction under Section 404 must include any adjacent wetlands that form the border of or are in reasonable proximity to other waters of the United States, as these wetlands are part of this aquatic system.

The July 25, 1975 regulation identifies "coastal" and "freshwater" wetlands contiguous or adjacent to other waters of the United States as separate categories of waters for inclusion in our overall definition of the term "waters of the United States." Many comments and suggestions were received on these terms.

Both "coastal" and "freshwater" wetlands as used in the July 25, 1975 regulation require that the area in question be "periodically inundated" by either saline, brackish or freshwater and "normally characterized by the prevalence of" salt or brackish water vegetation or vegetation that requires saturated soil conditions for growth and reproduction. Some felt that the criteria for delineating a wetland should not require both "periodic inundation" and the "prevalence of" vegetation, as either condition should suffice from the standpoint of protecting the entire aquatic system. Others raised concern over the vagueness of terms such as "perodically inundated", "normally", and "prevalence", and the lack of any definition for the terms "contiguous" or "adjacent".

In response to these comments, and with the assistance of the Departments of Interior and Agriculture and the Environmental Protection Agency, we have adopted the following definition of "wetlands":

> Those areas that are inundated or saturated by surface or ground water at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions. Wetlands generally include swamps, marshes, bogs, and similar areas.

This definition is intended to eliminate several problems and achieve certain results. The reference to "periodic inundation" has been eliminated. Many interpreted that term as requiring inundation over a record period of years. Our intent under Section 404 is to regulate discharges of dredged or fill material into the aquatic system as it exists, and not as it may have existed over a record period of time. The new definition is designed to achieve this intent. It pertains to an existing wetland and requires that the area be inundated or saturated by water at a frequency and duration sufficient to support aquatic vegetation. This inundation or saturation may be caused by either surface water, ground water, or a combination of both.

The use of the word "normally" in the old definition generated a great deal of confusion. The term was included in the definitions to respond to those situations in which an individual would attempt to eliminate the permit review requirements of Section 404 by destroying the aquatic vegetation, and to those areas that are not aquatic but experience an abnormal presence of aquatic vegetation. Several such instances of destruction of aquatic vegetation in order to eliminate Section 404 jurisdiction actually have occurred. However, even if this destruction occurs, the area still remains as part of the overall aquatic system intended to be protected by the Section 404 program. Conversely, the abnormal presence of aquatic vegetation in a non-aquatic area would not be sufficient to include that area within the Section 404 program.

We have responded to the concern for the vagueness of the term "normally" by replacing it with the phrase "* * * and that under normal circumstances to support * * *" We do not intend, by this clarification, to assert jurisdiction over those areas that once were wetlands and part of an aquatic system, but which, in the past, have been transformed into dry land for various purposes.

Concerns were also expressed over the types and amount of vegetation that would be required to establish a "wetland" under this definition. We have again used the term "prevalence" to distinguish from those areas that have only occasional aquatic vegetation interspersed with upland or dry land vegetation.

At the same time, we have changed our description of the vegetation involved by focusing on vegetation "typically adapted for life in saturated soil conditions." The old definition of "freshwater wetlands" provided a technical "loophole" by describing the vegetation as that which requires saturated soil conditions for growth and reproduction, thereby excluding many forms of truly aquatic vegetation that are prevalent in an inundated or saturated area, but that do not require saturated soil from a biological standpoint for their growth and reproduction. We intend to publish shortly vegetation guides to indicate the types of vegetation intended to be included in this definition, and to rely on the assistance of biologists, scientists and other technical experts from other Federal and State agencies to assist in delineating those wetland areas intended to be incuuded in this definition.

Several comments questioned the need for separate definitions of salt and brackish water wetlands (e.g. coastal wetlands) and freshwater wetlands. Others questioned whether salt and brackish water wetlands in nontidal waters and freshwater wetlands contiguous or adjacent to coastal wetlands were intended to be included in the definition, since these wetlands are part of the aquatic system. Still others ques-

tioned whether these definitions were also applicable to isolated wetlands that are not contiguous or adjacent to coastal waters and freshwater lakes, rivers, and streams, but which still contribute to interstate commerce.

The old definition was intended to include all fresh, brackish and salt water wetlands contiguous or adjacent to coastal waters and freshwater lakes, rivers, streams and other waters included in the definition of "waters of the United States." It was also intended to be used to identify isolated wetlands. We agree, however, that this intent was not clearly expressed. To remedy this situation, we have adopted one definition of wetlands. This definition will be applicable to those wetlands adjacent to coastal waters and freshwaters that are identified in the definition of "waters of the United States," and also to those isolated wetlands that are not adjacent to any lake, river, stream, or other coastal or freshwater. (See the discussion, above, on waters in Category 4.)

We have also responded to the concerns raised over the absence of any definition of the terms "adjacent" or "contiguous" as those terms relate to the location of wetlands. Since "contiguous" is only a subpart of the term "adjacent," we have eliminated the term "contiguous." At the same time, we have defined the term "adjacent" to mean "bordering, contiguous, or neighboring." The term would include wetlands that directly connect to other waters of the United States, or that are in reasonable proximity to these waters but physically separated from them by man-made dikes or barriers, natural river berms, beach dunes, and similar obstructions.

Finally, to respond to those who expressed concern that our definition of "wetlands" may be interpreted as extending to abnormal situations including non-aquatic areas that have aquatic vegetation, we have listed swamps, bogs, and marshes at the end of this definition to further clarify our intent to include only truly aquatic areas.

"High tide line." Many aquatic areas along the coast are located above the mean or mean higher high tide lines but do not fit within the definition of "wetlands" discussed above. These include sandflats, mudflats, and similar areas, that, while not covered with vegetation, are inundated with sufficient frequency and regularity to be included as part of the aquatic resource. While these areas are identified in our previous definition of waters of the United States, some commenters suggested the need for more definitive guidance in delineating the shoreward limit of jurisdiction in coastal areas when these circumstances exist. We have, therefore, adopted the term "high tide line" to delineate these areas. "High tide line" has been defined as "a line or mark left upon tide flats, beaches, or along shore objects that indicates the intersection of the land with the water's surface at the maximum height reached by a rising tide." The term is intended to include areas covered by spring high tides and other high tides that occur with periodic frequency, but does not include those areas that are covered by tidal water as a result of storm surges, hurricanes, or other intense storms.

Ordinary high water mark: A number of comments criticized the definition of "ordinary high water mark" adopted for purposes of delineating the landward limit of jurisdiction in freshwaters (absent adjacent wetlands). The comments indicated that other methods to define the ordinary high water mark have already been refined to a point of reasonable reliability based on the hydrologic movement of freshwaters, and that a second methodology under Section 404 would be administratively cumbersome. In addition, other concerns were expressed over the manner in which a "25% inundation" factor could be determined.

Responding to these comments, we have returned to our definition of "ordinary high water mark" used in the administration of our 1899 Act permit program. We believe that in waters where no wetlands are present, this definition will include those areas that are part of the aquatic system along these freshwater lakes, rivers and streams, as this mark is intended to include those areas where water will be present with predictable regularity.

Headwaters: The July 25, 1975 regulation established a cutoff point, referred to as the headwaters, for each river and stream identified as a water of the United States. "Headwaters" was defined as "the point on the stream beyond which the flow of the waterbody is normally less than five cubic feet per second." Waters above the "headwaters" cutoff point were also included as "waters of the United States," but only if the District Engineer determined that regulation of these waters was necessary to protect water quality.

Many comments and criticisms were received concerning the vagueness of our definition of "headwaters" and the legality of excluding waters in rivers and streams above the headwaters from the definition of waters of the United States. We have responded to these concerns and criticisms by: (1) Including the entire length of rivers and streams in our definition of waters of the United States; (2) utilizing the "headwaters" concept to establish the point on the stream below which an individual or general permit will be required to discharge dredged or fill material (discharges above headwaters are being permitted through the issuance today of a nationwide permit which is discussed in greater detail below); and (3) redefining the term "headwaters."

We have adopted the recommendations of a number of commenters and have redefined the term "headwaters" as the point on a freshwater (nontidal) stream above which the average annual flow is less than five cubic feet per second. Since precision is not required in establishing the headwater point, the definition allows the District Engineer to use approximate means to compute it. The drainage area that will contribute an average annual flow of five cubic feet per second can be estimated by approximating the proportion of the average annual precipitation that is expected to find its way into the stream. Having the area that will produce this flow, the "headwater" point can be approximated from drainage area maps.

However, we also recognized that streams with highly irregular flows, such as occur in the western portion of the country, could be dry at the "headwater" point for most of the year and still average on a yearly basis a flow of five cubic feet per second because of high volume, flash flood type flows which greatly distort the average. We therefore added an option for the District Engineer, after notifying the Regional Administrator of EPA, to establish the headwater based on the median rather than the average flow. A median flow of five cubic feet per second means that 50% of the time the flow is greater than five cubic feet per second and 50% of the time the flow is less than this value. This approach more realistically represents normal base flows of such streams.

We emphasize that the "headwaters" concept used in this new regulation is the point on the stream above which individual or general permits ordinarily will not be required. It is not to be construed as the point beyond which a stream ceases to be a water of the United States under Section 404 or the programs to regulate industrial and municipal discharges and oil and hazardous substances under other sections of the FWPCA. We also refer you to the discussion below on the nationwide permits that are being issued today for various discharges of dredged or fill materal, including those that occur above the headwater. We believe that the common sense conditions and management practices reflected in these nationwide permits will, if followed, avoid potential water quality problems for most of these discharges.

Lakes: The 1975 regulation defined "lakes" as "natural bodies of standing water greater than five acres in surface area and all bodies of standing water created by the impounding of waters of the United States."

A number of comments and criticisms were received concerning this definition. Some felt that the size limitation on natural lakes was too small, while others felt it was not small enough. Others questioned the legality of imposing any size limitation on natural lakes, since a lake less than five acres in size is just as much a "water of the United States" as one that is more than five acres in size.

Many raised questions about the manner and time for measurement of the five surface acres because of the seasonal fluctuations in water content exhibited by most lakes. Others suggested that we add to the list of artificial open bodies of water that are not included in the definition of lakes. (The 1975 definition excludes stock watering ponds and settling basins that are not created by impounding a river or stream.)

We have responded to these comments and criticisms in several ways. First, we have established definitions for two new terms: "natural lake" and "impoundment." We believe that these two sepa-

rate definitions will assist in alleviating the confusion expressed over the broad definition of "lake" as cited in the 1975 regulation.

At the suggestion of EPA, we have defined "natural lake" as "a natural depression fed by one or more streams and from which a stream may flow, that occurs due to the widening or natural blockage of a river or stream, or that occurs in an isolated natural depression that is not part of a surface river or stream." We believe that this definition reflects the three types of situations in which a natural lake may exist.

We have defined the term "impoundment" as a "standing body of open water created by artificially blocking or restricting the flow of a river, stream, or tidal area." Responding to several suggestions, we have clarified what is not included in the term "impoundment" by stating that it does not include artificial lakes or ponds created by excavating and/or diking dry land to collect and retain water for such purposes as stock watering, irrigation, settling basins, cooling, or rice growing.

Unlike the 1975 definition, no size limitation has been placed on the definitions of "natural lake" or "impoundment". Instead, we are permitting, today, through the issuance of nationwide permits, discharges of dredged or fill material into natural lakes, including their adjacent wetlands, that are less than 10 acres in surface area and that are either fed or drained by a river or stream above the headwaters, or isolated and not a part of a tributary system to navigable waters of the United States or interstate waters. (Discharges into natural lakes below the headwaters and isolated natural lakes greater than ten acres will require individual or general permits to satisfy the requirements of Section 301 of the FWPCA.) We are also issuing today a nationwide permit for discharges of dredged or fill material into non-tidal rivers, streams and their impoundments including adjacent wetlands that are located above the headwaters. (Again, discharges into impoundments below the headwaters of a river or stream will require an individual or general permit.) We refer you to our discussion of nationwide permits, below, for further details on this action.

We believe that the inclusion of adjacent wetlands as part of the 10 acre measurement of those natural lakes that are included in this definition will alleviate many concerns raised over how and when this measurement must occur. Since our definition of "wetlands" requires aquatic vegetation, we anticipate that the lake's measurement normally can be made on the basis of the presence of this vegetation, which generally remains fixed throughout the year, even if the water levels in the lake fluctuate.

Dredged and Fill Material. The 1975 regulation provided definitions for "dredged material", "discharge of dredged material", "fill material", and "discharge of fill material". Several comments and two years of experience have revealed the need to make certain changes to these definitions.

To respond to many misunderstandings over activities that require Section 404 permits, the 1975 regulation stated, in the definitions of "dredged material" and "fill material" that "material resulting from normal farming, silviculture, and ranching activities, such as plowing, cultivating, seeding, and harvesting for the production of food, fiber, and forest products" was not included. We intended, by this statement, to make it clear that activities such as plowing, seeding, harvesting, cultivating and any other activity by any industry that do not involve discharges of dredged or fill material cannot be included in the program. However, many interpreted this language as an exclusion of all practices by the farming and forestry industry including those that do involve discharges of dredged or fill material into water. The FWPCA does not allow us to make such an exemption or exclusion for any industry. (See *NRDC vs. Train*, 366 F. Supp. 1393 (D.D.C., 1975.)) We have, however, clarified our intent by stating at the end of our definitions of "discharge of dredged material" and "discharge of fill material" that plowing, seeding, cultivating and harvesting for the production of food, fiber, and forest products are not included in the Section 404 program.

The 1975 definition of "fill material" also excluded "material placed for the purpose of maintenance, including emergency reconstruction of recently damaged parts, of currently serviceable structures such as dikes, dams, levees, groins, riprap, breakwaters, causeways, and bridge abutments or approaches, and transportation structures." Since maintenance and emergency reconstruction of these types of fill often involve discharges into water, we do not have authority to exclude these activities from the permit requirements of the FWPCA. We have, therefore, eliminated this exclusion from our definition of "fill material". At the same time, we are issuing, today, a nationwide permit for discharges of dredged or fill material that involve maintenance and emergency reconstruction of existing fills. The nationwide permit contains basic common sense conditions and management practices which, if followed, will achieve the objectives of the FWPCA. Of course, if the maintenance or emergency reconstruction does not involve a discharge in water, no permit is required.

During the two years of experience with the Section 404 program, several industrial and municipal discharges of solid waste materials have been brought to our attention which technically fit within our definition of "fill material" but which were intended to be regulated under the NPDES program. These include the disposal of waste materials such as sludge, garbage, trash, and debris in water. In some cases involving the disposal of these types of material in water, the final result may be a landfill even though the primary purpose of the discharge is waste disposal.

The Corps and the Environmental Protection Agency feel that the initial decision relating to this type of discharge should be through the NPDES program. We have, therefore, modified our definition of fill material to exclude those pollutants that are discharged into water primarily to dispose of waste. We will process Section 404 permits for these types of activities to the extent that a levee or other type of containment structure must be placed in the water as part of the overall disposal plan. We will not, however, take any final action on the Section 404 permit application until a decision on the NPDES permit has been made (See 33 CFR 230.4(j)).

Individual, general, and nationwide permits: As we did in the regulation on our Section 10 program, we have included definitions of "individual", "general" and "nationwide" permits to distinguish between the three types of authorizations that will be used to satisfy the requirements of the FWPCA.

If a discharge requires an individual permit, an application must be made to the District Engineers following the procedures specified in 33 CFR Part 325 and the discharge cannot begin until and unless the permit is issued.

Before applying for an individual permit, however, a person needing a Section 404 permit should check to see whether the proposed discharge has already been permitted by a general permit, or a nationwide permit published in this regulation. District Engineers are issuing general permits for particular regions of the country that cover a wide variety of discharges that cause only minimal individual and cumulative adverse environmental impact. Nationwide permits apply throughout the country, and cover many types of minor activities. If a general or nationwide permit already covers your discharge, you should not have to get an individual permit to satisfy the requirements of the FWPCA.

Nationwide Permits

On May 16, 1977 we published proposed nationwide permits in the FEDERAL REGISTER to authorize discharges of dredged or fill material into certain waters of the United States and also certain specific categories of discharges. We received 163 letters commenting on these nationwide permits, the majority of which supported the concept but suggested additions, modifications and/or deletions to the activities covered and the conditions imposed.

Today, we are issuing nationwide permits for discharges into most of the Category 4 waters, discussed above, (isolated natural lakes larger than 10 acres are not included) and for certain specific categories of discharges into other waters. These nationwide permits are being incorporated into § 323.4.

We wish to take this opportunity to express our appreciation to everyone who commented on these nationwide permits. The following is a discussion of the sub-

stantive changes that were made as a result of your comments.

Management practices. The Environmental Protection Agency expressed concern over the potential for adverse cumulative effects that may be caused by some of the discharges that are subject to the nationwide permit. To minimize these potential effects, EPA suggested that we identify certain basic common sense management practices that should be followed, to the maximum extent possible, to minimize these potential adverse effects on the aquatic environment. We have adopted this suggestion. These management practices pertain to all discharges subject to these nationwide permits and are listed in § 323.4(b). We anticipate that compliance with these practices will avoid the potential for cumulative adverse water quality impacts that may be caused by these discharges.

We intend to remain aware of potential cumulative impacts that may occur on a regional basis as a result of these nationwide permits. If adverse cumulative impacts are anticipated from any of the discharges subject to these nationwide permits, we intend to take appropriate administrative action including the exercise of authority expressed in § 323.4–4 to require individual or general permits for these activities.

Discharges prior to effective dates of phasing (§ 323.4–1). The 1975 regulation authorized discharges of dredged or fill material that occurred before a particular phasing date. We have republished this authorization by including it in this nationwide permit. The conditions remain the same as were published in 1975.

Discharges into certain waters of the United States (§ 323.4–2). Many commenters expressed confusion over the types of waters that were covered by this nationwide permit, specifically with reference to those that are described in § 323.4–2(a)(4) as "non-tidal waters of the United States that are not part of a surface tributary system to interstate waters or navigable waters of the United States." We intended by this description to include those waters identified in "Category 4," above with the exception of isolated lakes larger than 10 acres. Thus, discharges of dredged or fill material into most of the "Category 4" waters are subject to this nationwide permit.

Numerous letters questioned whether wetlands adjacent to these "Category 4" waters were included as part of this nationwide permit. Discharges into these adjacent wetlands are included. Several environmental groups expressed concern over expanding the size limitations for natural lakes including prairie potholes to 10 acres, which they viewed as an apparent expansion from the present 5 acre lake "exclusion" contained in the Corps' 1975 regulations. As we have already indicated in our discussion on lakes above, the 5 acre standard, measured by surface area, was difficult to determine since, in many regions, the surface area of small lakes is subject to extreme seasonal variation. However, we have found that in most cases, the wetlands adjacent to these small natural lakes are more easily delineated and are relatively stable despite fluctuations in water levels. In order to simplify the identification of natural lakes described in § 323.4–2(a) (2) and (3) we adopted a standard for surface area measurement by including adjacent wetlands. Since these surrounding wetland areas are now included in the measurement, we increased the size limitation for lakes from 5 acres to 10 acres. Again, we emphasize that this size limitation is only used for determining whether an individual or general permit in lieu of this nationwide permit, is required.

We share the concern of the environmental groups that prairie potholes and many other isolated lakes are disappearing. The safeguards contained in the new management practices section of this permit, as well as the authority vested in the District Engineers to process individual or general permits where the concerns of the aquatic environment (as expressed in the EPA Guidelines) so require, will, we believe, adequately protect the broad range of water quality concerns and the public interest in "prairie potholes, small lakes, and other waters described by this section." Moreover, § 323.4–4 provides another safeguard through which EPA can bring concerns for water quality as expressed in the Section 404(b) Guidelines to the attention of the District Engineer.

Several commenters indicated that the third condition of this nationwide permit, dealing with erosion, was vague and overly broad. The condition has been changed to make our intent clear: the fill must be maintained in a manner to prevent erosion and other non-point sources of pollution.

EPA recommended that we include a condition that the discharge would not destroy members of a threatened or endangered species. We concur and this change has been made in this nationwide permit, as well as in the nationwide permit that authorizes discharges for certain types of activities. (See §§ 323.4–2(b)(1) and 323.4–3(b)(3).) We cannot agree to requests from industries to delete this condition altogether since Section (7) of the Endangered Species Act requires the Corps to protect threatened and endangered species in all waters subject to its regulatory jurisdiction.

We received a great number of comments from Resource Districts in opposition to the exception in our nationwide permits (§ 323.4–2(c)) for dams located above the headwaters which would be greater than 25 feet in height or 50 acre feet in impoundment capacity. As was pointed out, this exception would automatically require an individual permit for many dams above the headwaters which, in most cases, were exempt from individual permit requirements by the 1975 regulation. We are excluding this exception since we feel that our original reason for including it will now be satisfied by inclusion of the new management practices, discussed above. The deletion of § 323.4–2(3) means that any dam located above the headwater of a stream will be authorized by the nationwide permit unless the District Engineer applies his discretionary authority under § 323.4–4.

Specific categories of discharges. Comments on the types of activities and proposed conditions included in this portion of the nationwide permit ranged from environmental groups, who favored greater restrictions on permitted activities, to industry groups who proposed additional categories to be permitted to cover their particular activities. We feel that we have struck a reasonable balance between these concerns and requests through the addition of the management practices, discussed above. At the same time, we are committed to reviewing other classes and categories of discharges of dredged or fill material that may be, in the future, candidates for nationwide permits.

Utility lines (§ 323.4–3(a)(1)). This section has been amended to clarify that any excess material beyond that needed to restore the bottom contour to its preconstruction status must be removed to an upland disposal area. Such a requirement was envisioned in the proposed permit, but not clearly expressed. At the suggestion of EPA, we have explicitly stated this requirement to insure compliance and avoid misunderstanding.

Numerous commenters suggested further clarification on what was intended by the use of the term "utility line." We have defined the term to include any pipe or pipeline for the transportation of any gaseous, liquid, liquifiable, or slurry substance, and any cable, line, or wire for the transmission of energy, telephone, radio, or television communication.

Despite several suggestions for prenotification requirements and fill length and volume restrictions, we do not believe that these conditions are necessary. We feel, instead, that upland disposal of excess material and compliance with the management practices will limit any sedimentation or disruption of water flow in streams as a result of these activities.

Bank stabilization (§ 323.4–3(a)(2)). We have modified this category of discharge to make it clear that only *necessary* bank stabilization for erosion prevention is being permitted. While some suggested that we include a pre-notification requirement, we do not feel that this is necessary.

Minor road crossing fills (§ 323.4–3(a)(3)). This category of activity generated more specific comment than any other of the proposed nationwide permits. We have made certain changes to respond to these comments.

At the request of many commenters, we have removed the 30 day advance notification requirement for discharges between 100 and 200 cubic yards in quantity. We believe that this is impractical to administer and that the basic intent for the notification has been offset by the inclusion of management practices.

Our proposed nationwide permit provided that a crossing must be culverted or bridged to prevent the restriction of normal flow. In response to comments by

EPA and environmental groups "normal" has been changed to "expected high flows." This change will provide more effective drainage and reduce erosion during expected flood stage levels.

Forest industry commenters were almost unanimous in their calls for deleting the 100 to 200 cubic yard reporting requirement (see above) and increasing both the 200 cubic yard fill limit and the 50 foot wetland width limitation. They indicated that many minor road crossings with little or no direct or cumulative environmental impact would not qualify under our proposed permit. Their main source of concern was the 50 foot limit on wetlands adjacent to the waterbody to be crossed. In reviewing the comments it became apparent that confining road crossing activities in adjacent wetlands to 50 feet on either side of the ordinary high water mark of the waterbody would result in excluding many small roadfills from this nationwide permit. On the other hand, others applauded our 50 foot limit and urged a reduction in the allowable level of fill. After carefully considering all comments on this permit we decided that the allowable wetland width to be crossed could be increased from 50 to 100 feet on either side of the stream as long as this allowance was applicable to non-tidal streams. In tidal waters, where adjacent wetlands are more dependent on frequent tidal flushing, and therefore circulation impairments from road fills are more damaging, we concluded that even the 50 foot wetland fill needed to be controlled through an individual or general permit. We, therefore, divided the road fill permit into tidal and non-tidal waters. For non-tidal waterbodies, we increased the adjacent wetland width from 50 to 100 feet. For tidal water crossings (Section 323.4-3(a)(4)) we included only the fill placed incidental to the construction of the bridge itself. Any approach fills or causeways associated with the crossings of tidal waters will require an individual or general Section 404 permit if located in waters of the United States.

One commenter expressed concern that no restriction had been placed on the total amount of fill above the ordinary high water mark, since this could lead to erosion on steep slopes between the ordinary high water mark and the road surface. The letter also feared that without a total fill limit, vast amounts of wetlands could be filled at right angles to the waterbody for roads or turn around areas. We share this commenter's concerns. However, we believe that adherence to the management practices suggested by EPA will minimize erosion and other non-profit sources of pollution. As for his second concern, it must be noted that § 323.4-3(a)(3) only permits minor road crossings and attendant features. It does not authorize general road building in wetlands above the ordinary high water mark. We will construe attendant features narrowly. Major activities appurtenant to the road crossing will not be permitted by this section. These require an individual or general permit issued pursuant to procedures in 33 CFR Part 325.

Many commenters expressed confusion over the 100/200 cubic yard measurement as it pertains to these roadfills. We intended to use that measurement to define the size of the crossing, and to use the ordinary high water mark to determine that size. Thus, up to 200 cubic yards of material can be discharged below the plane of ordinary high water of a waterbody under this nationwide permit, and additional cubic yards of material can be discharged into the 100 foot strip of adjacent wetlands, as necessary, to construct the road provided the conditions to protect those wetlands are satisfied. We have expressed this intent by including a definition of "minor road fill" in the nationwide permit.

Repair, rehabilitation and replacement of existing fills (§323.4-3(a)(4)). As we have previously indicated, the 1975 regulations excluded material placed for maintenance and emergency reconstruction of fills from the definition of "fill material." We have added this previously excluded activity to the list of those that are being permitted today by this nationwide permit.

EPA, Conservation Commissions, and environmental groups noted that the condition in subparagraph (f) that the discharge not disrupt the migration of indigenous aquatic life was not sufficient to safeguard the passage of nonmigratory aquatic life. The final nationwide permit condition reflects this concern by changing "migration" to "movement."

Subparagraph (6) has been amended to clarify its intent to control erosion and other non-points sources of pollution. This subparagraph is consistent with changes made in § 323.4-2(b)(3).

A new condition has been added at the request of the Department of the Interior to exclude components of National and State wild and scenic river systems (established pursuant to the Wild and Scenic Rivers Act) from the nationwide permit programs (§§ 323.4-2(b)(4) and 323.4-3(b)(7)).

Discretionary authority to require individual or general permits (§ 323.4-4). Comments received from industry groups suggested that this section was superfluous since by definition any activity performed in accordance with the conditions in §§ 323.4-2 or 323.4-3 would have minimum adverse water quality impact and would not trigger EPA Guideline concerns. On the other hand other commenters suggested more stringent controls over erosion, water quality, chemical use, restoration of abandoned projects and wildlife protection. In order to make our regulatory program work, we are relying on decentralization and our flexibility to respond to local conditions. Moreover, if we overburden this nationwide permit with specific conditions, its intent and usefulness is reduced. On the other hand, we realize that local conditions may be such that special restrictions are required for activities otherwise acceptable in most areas and certain waters of the United States otherwise covered by a nationwide permit require special restrictions. We believe the most efficient means to do this is to grant our District Engineers the authority to require individual or general permits, as needed, to respond to these local conditions. To this end we invite the help of private groups, citizens, and Federal and State agencies to help our District Engineers respond to these localized concerns.

All Federal agencies that commented expressed support for the concept of nationwide permits, as did 81% of the public comment letters. We believe these new nationwide permits represent a major step forward in reducing unnecessary reviews and delay associated with regulation of minor discharges of dredged or fill material into waters of the United States.

An environmental assessment and a Findings of Fact have been prepared for these nationwide permits as well as for the Section 10 nationwide permits and are available for review in the Office, Chief of Engineers, Forrestal Building, Room 5F-036, Washington, D.C. 20314.

PART 324

This Part prescribes the special policies and procedures that will be used to evaluate applications for permits to transport dredged material for purposes of dumping in ocean waters pursuant to Section 103 of the Ocean Dumping Act. These policies and procedures must also be read in conjunction with the applicable general policies of Part 320 and general procedures of 325. If you need a permit to dump dredged material in the oceans, you should also refer to Part 322 since a permit will be required under Section 10 of the 1899 Act to dredge in navigable waters of the United States.

Part 324 corresponds to Sections (d)(3), (e)(3), and (g)(17) of rescinded 33 CFR 209.120.

We have adopted the definitions of "oceans waters", "dredged material", and "transport" as used by the Ocean Dumping Act.

In accordance with recent revisions to EPA criteria for the evaluation of the ocean dumping of dredged material, we have included requirements for additional specific information that must be included as part of a public notice for a proposed ocean dumping of dregded material. We have also specifically included the requirement that District Engineers consider the availability of land based alternatives during the evaluation of applications for ocean dumping permits. (See also § 320.4(a)(2)).

Procedures have also been included in this Part for those cases in which EPA objects to the proposed dumping of dregded material in ocean waters as being inconsistent with the EPA criteria. (See § 324.4(c)-(e)).

PART 325

This Part describes the procedures for processing all applications for Department of the Army permits, and for modi-

fying or revoking permits that have been issued. It corresponds to and supersedes paragraphs (h) through (s) of rescinded 33 CFR 209.120. The following is a summary of the major changes:

The material was reorganized for clarity. For example, public notice and environment impact statement (EIS) procedures, which were discussed in a number of different places in the rescinded regulation, were consolidated into single paragraphs.

The EIS procedures were revised to allow for a public hearing at completion of the draft EIS rather than the proposed final EIS; to require a public notice of the final EIS filing; and to provide for transmittal of the District Engineer's report to higher authority for decision, if required, after completion of the 30 day comment period on the final EIS (§ 325.4).

Permit file documentation requirements have been clarified. The District Engineer must prepare an impact assessment document (either an environmental assessment or an EIS) for each application and a decision document (either a Findings of Fact or, if the case is sent forward for decision, his report on the application) (§ 325.2(a)).

District Engineers have been delegated expanded authority to deny permits, including those which he determines are not in the public interest. (Their previous denial authority was limited to navigational conflicts and denial of a related state or local certification or authorization.) District Engineers have also been given the authority to issue most permits found to be in the public interest over unresolved objections of another Federal agency if that agency indicates that it does not desire to refer the application to a higher level of authority for review. (§ 325.8(b)).

Litigation potential and objection from a member of Congress have been deleted as reasons for automatically having to refer an application to the Chief of Engineers for decision. (§ 325.8(d)).

Procedures relating to the Coastal Zone Management Act have been made compatible with new regulations of the National Oceanic and Atmospheric Administration to be published as 15 CFR 930 (§ 325.2(b)(2)).

PART 326

This Part prescribes the policies and procedures that will be used by the Corps in the enforcement of the requirements of the River and Harbor Act of 1899, the FWPCA, and the Ocean Dumping Act. The Part corresponds to rescinded 33 CFR 209.120(g)(12), and is generally a restatement of the provisions in that rescinded section.

We have made several additions and clarifications to this enforcement regulation. On August 22, 1975, the Chief of Engineers delegated authority to District Engineers to refer certain types of cases involving unauthorized activities directly to the local U.S. Attorney. This delegation included the following types of cases: (1) All unauthorized structures or work falling exclusively within the scope of Section 10 of the 1899 Act for which a criminal fine or penalty under Section 12 of that Act is considered appropriate; (2) all civil actions involving small unauthorized structures, such as piers, which require restoration or modification by judicial order because efforts to secure voluntary compliance have failed; (3) all violations of Section 301 of the FWPCA involving unauthorized discharges of dredged or fill material into waters of the United States, unless the case involves a substantial question of law or fact, or a request for substantial restoration; and (4) all cases for which a temporary restraining order and/or preliminary injunction is appropriate following non-compliance with a cease and desist order issued by the District Engineer.

We have restated this delegation of authority in this regulation, as well as certain basic policy guidance (also previously included in the August, 1975 delegation) for use by the District Engineer in determining whether civil and/or criminal action is appropriate. We have also incorporated the policies and procedures expressed in a Memorandum, dated June 1, 1976, entitled "EPA Enforcement Policy for Noncompliance with Section 404 of the FWPCA", which was signed by the Assistant Administrator for Enforcement of EPA and concurred in by the Assistant Attorney General and the Chief Counsel of the Corps of Engineers.

Authority to refer certain types of cases directly to the local U.S. Attorney has not been delegated to the District Engineer either because of the extreme seriousness of the case or because the law on the particular type of case has not developed to the point to which Departmental level attention is no longer required.

We intend to propose revisions to this regulation in the near future that will provide further policy and procedural guidance and that will incorporate other enforcement authorities.

PART 327

This Part prescribes the policies and procedures to be followed by the Corps in the conduct of public hearings. A public hearing may become necessary in the evaluation of an application for a Department of the Army permit. The Part restates the policies and procedures that were prescribed in rescinded 33 CFR 209.133.

PART 328

This Part prescribes the policies and procedures used in the establishment of harborlines pursuant to Section 11 of the River and Harbor Act of 1899 (33 U.S.C. 404). As previously indicated, harborlines are only used as guidance to the District Engineer concerning the impact that a particular activity may have on navigation. Activities occurring landward of established harborlines must still have permits under Sections 9 or 10 of the 1899 Act, and may also require permits under Section 404 of the FWPCA and Section 103 of the Ocean Dumping Act. This part restates the policies and procedures expressed in rescinded 33 CFR 209.150.

PART 329

This Part corresponds to rescinded 33 CFR 209.260 and provides the administrative definition of the term "navigable waters of the United States" as used throughout Parts 320–325.

Two changes have been made to this regulation. First, pursuant to the decision of *United States* v. *Stoeco Homes, Inc.*, 498 F.2d 597, (3rd Cir., 1974), *cert. den.*; 420 U.S. 927 (1975), we have included artificial waters subject to tidal action within our administrative definition of navigable waters of the United States. Second, we have delegated authority to Division Engineers to make determinations of navigability. (Previously, this authority existed with the Chief of Engineers.) Accordingly, 33 CFR 209.120, 209.125, 209.131, 209.133, 209.150 and 209.260 are revoked and reserved and 33 CFR 320 through 329 are added as set forth below.

NOTE.—The Department of the Army has determined that this document does not contain a major proposal requiring preparation of an Inflation Impact Statement under Executive Order 11821 and OMB Circular A–107.

(33 U.S.C. 401; 33 U.S.C. 403; 33 U.S.C. 1344; 33 U.S.C. 1413.)

Dated: July 13, 1977.

DRAKE WILSON,
Brigadier General, USA,
Deputy Director of Civil Works.

Chapter II of 33 CFR is amended as follows:

PART 209—ADMINISTRATIVE PROCEDURES

§§ 209.120, 209.125, 209.131, 209.133, 209.150, and 209.260 [Reserved]

1. The above sections are revoked and reserved.

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2. The following parts 320 through 329 are added:

PART 320—GENERAL REGULATORY POLICIES

Sec.
320.1 Purpose and scope.
320.2 Authorities to issue permits.
320.3 Related legislation.
320.4 General policies for evaluating permit applications.

AUTHORITY: 33 U.S.C. 401 et seq.; 33 U.S.C. 1344; 33 U.S.C. 1413.

§ 320.1 Purpose and scope.

(a) *Types of activities regulated.* This regulation and the regulations that follow (33 CFR 321–329) prescribe the statutory authorities, and general and special policies and procedures applicable to the review of applications for Department of the Army permits for various types of activities that occur in waters of the United States or the oceans. This part identifies the various Federal statutes that require Department of the Army permits before these activities can be lawfully undertaken; the related Federal legislation applicable to the review of each activity that requires a Department of the Army permit; and the general policies that are applicable

to the review of all activities that require Department of the Army permits. Parts 321–324 address the various types of activities that require Department of the Army permits, including special policies and procedures applicable to those activities, as follows:

(1) Dams or dikes in navigable waters of the United States (Part 321);

(2) All other structures or work including excavation, dredging, and/or disposal activities, in navigable waters of the United States (Part 322);

(3) All activities that alter or modify the course, condition, location, or capacity of a navigable water of the United States (Part 322);

(4) Construction of fixed structures and artificial islands on the outer continental shelf (Part 322);

(5) All discharges of dredged or fill material into the waters of the United States (Part 323); and

(6) All activities involving the transportation of dredged material for the purpose of dumping it in ocean waters (Part 324).

(b) *Forms of authorization.* Department of the Army permits for the above described activities are issued under various forms of authorization. These include individual permits; letters of permission that are issued following a review of an individual application for a Department of the Army permit; general permits that authorize the performance of a category or categories of activities in a specific geographical region after it is determined that these activities will cause only a minimal individual and cumulative adverse environmental impact; and nationwide permits that authorize the performance of certain specified activities throughout the Nation. The nationwide permits are found in 33 CFR 322.4 and 323.4. If an activity is covered by a general or nationwide permit, an application for a Department of the Army permit does not have to be made. In such cases, a person must only comply with the conditions contained in the general or nationwide permit to satisfy the requirements of law.

(c) *General instructions.* The procedures for processing all letters of permission, individual permits, and general permits are contained in 33 CFR 325. However, before reviewing those procedures, a person desiring to perform any activity that requires a Department of the Army permit is advised to review the general and special policies that relate to the particular activity as outlined in this Part 320 and Parts 321 through 324. The terms "navigable waters of the United States" and "waters of the United States" are used frequently throughout these regulations, and it is important that the reader understand the difference from the outset. "Navigable waters of the United States" are defined in 33 CFR 329. These are the traditional waters where permits are required for work or structures pursuant to sections 9 and 10 of the River and Harbor Act of 1899. "Waters of the United States" are defined in 33 CFR 323.2(a). These waters include more than navigable waters of the United States and are the waters where permits are required for the discharge of dredged or fill material pursuant to section 404 of the Federal Water Pollution Control Act Amendments of 1972.

§ 320.2 Authorities to issue permits.

(a) Section 9 of the River and Harbor Act approved March 3, 1899 (30 Stat. 1151; 33 USC 401) (hereinafter referred to as Section 9) prohibits the construction of any dam or dike across any navigable water of the United States in the absence of Congressional consent and approval of the plans by the Chief of Engineers and the Secretary of the Army. Where the navigable portions of the waterbody lie wholly within the limits of a single State, the structure may be built under authority of the legislature of that State, if the location and plans or any modification thereof, are approved by the Chief of Engineers and by the Secretary of the Army. The instrument of authorization is designated a permit. Section 9 also pertains to bridges and causeways but the authority of the Secretary of the Army and Chief of Engineers with respect to bridges and causeways was transferred to the Secretary of Transportation under the Department of Transportation Act of October 15, 1966 (80 Stat. 941, 49 USC 1155g (6)(A)). See also 33 CFR Part 321. A Department of the Army authorization is required for the discharge of dredged or fill material into waters of the United States associated with bridges and causeways pursuant to Section 404 of the Federal Water Pollution Control Act Amendments of 1972 (33 USC 1344). See CFR Part 323.

(b) Section 10 of the River and Harbor Act approved March 3, 1899 (30 Stat. 1151; 33 USC 403) (hereinafter referred to as Section 10) prohibits the unauthorized obstruction or alteration of any navigable water of the United States. The construction of any structure in or over any navigable water of the United States, the excavation from or depositing of material in such waters, or the accomplishment of any other work affecting the course, location, condition, or capacity of such waters is unlawful unless the work has been recommended by the Chief of Engineers and authorized by the Secretary of the Army. The instrument of authorization is designated a permit, general permit, or letter of permission. The authority of the Secretary of the Army to prevent obstructions to navigation in the navigable waters of the United States was extended to artificial islands and fixed structures located on the outer continental shelf by Section 4(f) of the Outer Continental Shelf Lands Act of 1953 (67 Stat. 463; 43 U.S.C. 1333(f)). See also 33 CFR Part 322.

(c) Section 11 of the River and Harbor Act approved March 3, 1899 (30 Stat. 1151; 33 U.S.C. 404) authorizes the Secretary of the Army to establish harbor lines channelward of which no piers, wharves, bulkheads or other works may be extended or deposits made without approval of the Secretary of the Army. By policy stated in 33 CFR 328, effective May 27, 1970, harbor lines are guidelines only for defining the offshore limits of structures and fills insofar as they impact on navigation interests. Permits for work shoreward of those lines must be obtained in accordance with Section 10 and, if applicable, Section 404.

(d) Section 13 of the River and Harbor Act approved March 3, 1899 (30 Stat. 1152; 33 U.S.C. 407) provides that the Secretary of the Army, whenever the Chief of Engineers determines that anchorage and navigation will not be injured thereby, may permit the discharge of refuse into navigable waters. In the absence of a permit, such discharge of refuse is prohibited. While the prohibition of this section, known as the Refuse Act, is still in effect, the permit authority of the Secretary of the Army has been superseded by the permit authority provided the Administrator, Environmental Protection Agency, and the States under Sections 402 and 405 of the Federal Water Pollution Control Act Amendments of 1972 (PL 92–500, 86 Stat. 816, 33 U.S.C. 1342 and 1345). See 40 CFR Parts 124 and 125.

(e) Section 14 of the River and Harbor Act approved March 3, 1899 (30 Stat. 1152; 33 U.S.C. 408) provides that the Secretary of the Army on the recommendation of the Chief of Engineers may grant permission for the temporary occupation or use of any sea wall, bulkhead, jetty, dike, levee, wharf, pier, or other work built by the United States. This permission will be granted by an appropriate real estate instrument in accordance with existing real estate regulations.

(f) Section 1 of the River and Harbor Act of June 13, 1902 (32 Stat. 371; 33 U.S.C. 565) allows any persons or corporations desiring to improve any navigable river at their own expense and risk to do so upon the approval of the plans and specifications by the Secretary of the Army and the Chief of Engineers. Improvements constructed under this authority, which are primarily in Federal project areas, remain subject to the control and supervision of the Secretary of the Army and the Chief of Engineers.

(g) Section 404 of the Federal Water Pollution Control Act Amendments of 1972 (PL 92–500, 86 Stat. 816, 33 U.S.C. 1344) (hereinafter referred to as Section 404) authorizes the Secretary of the Army, acting through the Chief of Engineers, to issue permits, after notice and opportunity for public hearings, for the discharge of dredged or fill material into the waters of the United States at specified disposal sites. See 33 CFR 323. The selection and use of disposal sites will be in accordance with guidelines developed by the Administrator of the Environmental Protection Agency (EPA) in conjunction with the Secretary of the Army, published in 40 CFR Part 230. If these guidelines prohibit the selection or use of a disposal site, the Chief of Engineers may consider the economic impact on navigation of such a prohibition in reaching his decision. Furthermore, the

Administrator can prohibit or restrict the use of any defined area as a disposal site whenever he determines, after notice and opportunity for public hearings and after consultation with the Secretary of the Army, that the discharge of such materials into such areas will have an unacceptable adverse effect on municipal water supplies, shellfish beds and fishery areas, wildlife, or recreational areas.

(h) Section 103 of the Marine Protection, Research and Sancturaries Act of 1972, as amended (PL 92-532, 86 Stat. 1052, 33 U.S.C. 1413) (hereinafter referred to as Section 103) authorizes the Secretary of the Army, acting through the Chief of Engineers, to issue permits, after notice and opportunity for public hearings, for the transportation of dredged material for the purpose of dumping it in ocean waters where it is determined that the dumping will not unreasonably degrade or endanger human health, welfare, or amenities, or the marine environment, ecological system, or economic potentialities. The selection of disposal sites will be in accordance with criteria, developed by the Administrator of the EPA in consultation with the Secretary of the Army, published in 40 CFR Parts 220-229. However, similar to the EPA Administrator's limiting authority cited in subparagraph (g), above, the Administrator can prevent the issuance of a permit under this authority if he finds that the dumping of the material will result in an unacceptable adverse impact on municipal water supplies, shellfish beds, wildlife, fisheries or recreational areas. See also 33 CFR Part 324.

§ 320.3 Related legislation.

(a) Section 401 of the Federal Water Pollution Control Act Amendments of 1972 (PL 92-500; 86 Stat. 816, 33 U.S.C. 1341) requires any non-Federal applicant for a Federal license or permit to conduct any activity that may result in a discharge of a pollutant into waters of the United States to obtain a certification from the State in which the discharge originates or will originate, or, if appropriate, from the interstate water pollution control agency having jurisdiction over the affected waters at the point where the discharge originates or will originate, that the discharge will comply with the applicable effluent limitations and water quality standards. A certification obtained for the construction of any facility must also pertain to the subsequent operation of the facility.

(b) Section 307(c) of the Coastal Zone Management Act of 1972, as amended (PL 94-370, 90 Stat. 1013, 16 U.S.C. 1456(c)) requires Federal agencies conducting activities, including development projects, directly affecting a State's coastal zone, to comply, to the maximum extent practicable, with an approved State coastal zone management program. It also requires any non-Federal applicant for a Federal license or permit to conduct an activity affecting land or water uses in the State's coastal zone to furnish a certification that the proposed activity will comply with the State's coastal zone management program. Generally, no permit will be issued until the State has concurred with the non-Federal applicant's certification. This provision becomes effective upon approval by the Secretary of Commerce of the State's coastal zone management program. See also 15 CFR Part 930.

(c) Section 302 of the Marine Protection, Research and Sanctuaries Act of 1972, as amended, (PL 92-532, 86 Stat. 1052, 16 U.S.C. 1432) authorizes the Secretary of Commerce, after consultation with other interested Federal agencies and with the approval of the President, to designate as marine sanctuaries those areas of the ocean waters or of the Great Lakes and their connecting waters or of other coastal waters which he determines necessary for the purpose of preserving or restoring such areas for their conservation, recreational, ecological, or aesthetic values. After designating such an area, the Secretary of Commerce shall issue regulations to control any activities within the area. Activities in the sanctuary authorized under other authorities are valid only if the Secretary of Commerce certifies that the activities are consistent with the purposes of Title III of the Act and can be carried out within the regulations for the sanctuary.

(d) The National Environmental Policy Act of 1969 (42 U.S.C. 4321-4347) declares the national policy to encourage a productive and enjoyable harmony between man and his environment. Section 102 of that Act directs that "to the fullest extent possible: (1) The policies, regulations, and public laws of the United States shall be interpreted and administered in accordance with the policies set forth in this Act, and (2) all agencies of the Federal Government shall * * * insure that presently unquantified environmental amenities and values may be given appropriate consideration in decision making along with economic and technical considerations * * *". See also 33 CFR Part 325 and 33 CFR 209.410.

(e) The Fish and Wildlife Act of 1956 (16 U.S.C. 742a, et seq.), the Migratory Marine Game-Fish Act (16 U.S.C. 760c-760g) and the Fish and Wildlife Coordination Act (16 U.S.C. 661-666c) and other acts express the concern of Congress with the quality of the aquatic environment as it affects the conservation, improvement and enjoyment of fish and wildlife resources. Reorganization Plan No. 4 of 1970 transferred certain functions, including certain fish and wildlife-water resources coordination responsibilities, from the Secretary of the Interior to the Secretary of Commerce. Under the Fish and Wildlife Coordination Act and Reorganization Plan No. 4, any Federal agency that proposes to control or modify any body of water must first consult with the United States Fish and Wildlife Service, the National Marine Fisheries Service, as appropriate, and with the head of the appropriate State agency exercising administration over the wildlife resources of the affected State.

(f) The Federal Power Act of 1920 (41 Stat. 1063; 16 U.S.C. 791a et seq.), as amended, authorizes the Federal Power Commission (FPC) to issue licenses for the construction, operation and maintenance of dams, water conduits, reservoirs, power houses, transmission lines, and other physical structures of a power project. However, where such structures will affect the navigable capacity of any navigable waters of the United States (as defined in 16 U.S.C. 796), the plans for the dam or other physical structures affecting navigation must be approved by the Chief of Engineers and the Secretary of the Army. In such cases, the interests of navigation should normally be protected by a recommendation to the FPC for the inclusion of appropriate provisions in the FPC license rather than the issuance of a separate Department of the Army permit under 33 U.S.C. 401 et seq. As to any other activities in navigable waters not constituting construction, operation and maintenance of physical structures licensed by the FPC under the Federal Power Act of 1920, as amended, the provisions of 33 U.S.C. 401 et seq. remain fully applicable. In all cases involving the discharge of dredged or fill material into waters of the United States or the transportation of dredged material for the purpose of dumping in ocean waters, Section 404 or Section 103 will be applicable.

(g) The National Historic Preservation Act of 1966 (80 Stat. 915, 16 U.S.C. 470) created the Advisory Council on Historic Preservation to advise the President and Congress on matters involving historic preservation. In performing its function the Council is authorized to review and comment upon activities licensed by the Federal Government which will have an effect upon properties listed in the National Register of Historic Places, or eligible for listing. The concern of Congress for the preservation of significant historical sites is also expressed in the Preservation of Historical and Archeological Data Act of 1974 (16 U.S.C. 469 et seq.), which amends the Act of June 27, 1960. By this Act, whenever a Federal construction project or Federally licensed project, activity or program alters any terrain such that significant historical or acheological data is threatened, the Secretary of the Interior may take action necessary to recover and preserve the data prior to the commencement of the project. See also 33 CFR Part 305.

(h) The Interstate Land Sales Full Disclosure Act (15 USC 1701 et seq.) prohibits any developer or agent from selling or leasing any lot in a subdivision (as defined in 15 USC 1701(3)) unless the purchaser is furnished in advance a printed property report containing information which the Secretary of Housing and Urban Development may, by rules or regulations, require for the protection of purchasers. In the event the lot in question is part of a project that requires Department of the Army authorization, the Property Report is required by Housing and Urban Development regulation to state whether or not

a permit has been applied for, issued, or denied by the Corps of Engineers for the development under Section 10 or Section 404. The Property Report is also required to state whether or not any enforcement action has been taken as a consequence of non-application for or denial of such permit.

(i) The Endangered Species Act of 1973 (16 U.S.C. 1531 et seq.) declares the intention of the Congress to conserve threatened and endangered species and the ecosystems on which those species depend. The Act provides that Federal agencies must utilize their authorities in furtherance of its purposes by carrying out programs for the conservation of endangered or threatened species, and by taking such action necessary to insure that any action authorized by that Agency will not jeopardize the continued existence of such endangered or threatened species or result in the destruction or modification of habitat of such species which is determined by the Secretaries of Interior or Commerce, as appropriate, to be critical. See also 50 CFR Part 17.

(j) The Deepwater Port Act of 1974 (33 U.S.C. 1501 et seq.) prohibits the ownership, construction, or operation of a deepwater port beyond the territorial seas without a license issued by the Secretary of Transportation. The Secretary of Transportation may issue such a license to an applicant if he determines, among other things, that the construction and operation of the deepwater port is in the national interest and consistent with national security and other national policy goals and objectives. An application for a deepwater port license constitutes an application for all Federal authorizations required for the ownership, construction, and operation of a deepwater port, including applications for Section 10, Section 404 and Section 103 permits which must also be issued by the Department of the Army pursuant to the authorities listed in § 320.2. The Secretary of Transportation must obtain the views and recommendations of all Federal agencies having jurisdiction over any aspect of the deepwater port construction and operation prior to issuing a license.

(k) The Marine Mammal Protection Act of 1972 (16 U.S.C. 1361 et seq.) expresses the intent of Congress that marine mammals be protected and encouraged to develop in order to maintain the health and stability of the marine ecosystem. The Act imposes a perpetual moratorium on the harassment, hunting, capturing, or killing of marine mammals and on the importation of marine mammals and marine mammal products without a permit from either the Secretary of the Interior or the Secretary of Commerce, depending upon the species of marine mammal involved. Such permits may be issued only for purposes of scientific research and for public display if the purpose is consistent with the policies of the Act. The appropriate Secretary is also empowered in certain restricted circumstances to waive the requirements of the Act.

(l) Section 7(a) of the Wild and Scenic Rivers Act (82 Stat. 906, 16 U.S.C. 1278 et seq.) provides that no department or agency of the United States shall assist by loan, grant, license, or otherwise in the construction of any water resources project that would have a direct and adverse effect on the values for which such river was established, as determined by the Secretary charged with its administration. No department or agency of the United States shall recommend authorizing of any water resources project that would have a direct and adverse effect on the values for which such river was established, as determined by the Secretary charged with its administration, or request appropriations to begin construction of any such project, whether heretofore or hereafter authorized, without advising the Secretary of the Interior or the Secretary of Agriculture, as the case may be, in writing of its intention so to do at least sixty days in advance, and without specifically reporting to the Congress in writing at the time it makes its recommendation or request in what respect construction of such project would be in conflict with the purposes of this Act and would affect the component and the values to be protected by it under this Act.

(m) Section 6(f) of the Land and Water Conservation Fund Act of 1965 (78 Stat. 897, 16 USC 460 *l*–4, *et seq.*) provides that no property acquired or developed with assistance from the Land and Water Conservation Fund shall, without the approval of the Secretary of the Interior, be converted to other than public outdoor recreation uses. The Secretary shall approve such conversion only if he finds it to be in accord with the then existing comprehensive statewide outdoor recreation plan and only upon such conditions as he deems necessary to assure the substitution of other recreation properties of at least equal fair market value and of reasonably equivalent usefulness and location.

§ 320.4 General policies for evaluating permit applications.

The following policies shall be applicable to the review of all applications for Department of the Army permits. Additional policies specifically applicable to certain types of activities are identified in Parts 321–324 of this chapter.

(a) *Public interest review.* (1) The decision whether to issue a permit will be based on an evaluation of the probable impact of the proposed activity and its intended use on the public interest. Evaluation of the probable impact which the proposed activity may have on the public interest requires a careful weighing of all those factors which become relevant in each particular case. The benefit which reasonably may be expected to accrue from the proposal must be balanced against its reasonably foreseeable detriments. The decision whether to authorize a proposal, and if so, the conditions under which it will be allowed to occur, are therefore determined by the outcome of the general balancing process (e.g., see 33 CFR 209.400, Guidelines for Assessment of Economic, Social and Environmental Effects of Civil Works Projects). That decision should reflect the national concern for both protection and utilization of important resources. All factors which may be relevant to the proposal must be considered; among those are conservation, economics, aesthetics, general environmental concerns, historic values, fish and wildlife values, flood damage prevention, land use, navigation, recreation, water supply, water quality, energy needs, safety, food production, and, in general, the needs and welfare of the people. No permit will be granted unless its issuance is found to be in the public interest.

(2) The following general criteria will be considered in the evaluation of every application:

(i) the relative extent of the public and private need for the proposed structure or work;

(ii) the desirability of using appropriate alternative locations and methods to accomplish the objective of the proposed structure or work;

(iii) the extent and permanence of the beneficial and/or detrimental effects which the proposed structure or work may have on the public and private uses to which the area is suited; and

(iv) the probable impact of each proposal in relation to the cumulative effect created by other existing and anticipated structures or work in the general area.

(b) *Effect on wetlands.* (1) Wetlands are vital areas that constitute a productive and valuable public resource, the unnecessary alteration or destruction of which should be discouraged as contrary to the public interest.

(2) Wetlands considered to perform functions important to the public interest include:

(i) Wetlands which serve important natural biological functions, including food chain production, general habitat, and nesting, spawning, rearing and resting sites for aquatic or land species;

(ii) Wetlands set aside for study of the aquatic environment or as sanctuaries or refuges;

(iii) Wetlands the destruction or alteration of which would affect detrimentally natural drainage characteristics, sedimentation patterns, salinity distribution, flushing characteristics, current patterns, or other environmental characteristics;

(iv) Wetlands which are significant in shielding other areas from wave action, erosion, or storm damage. Such wetlands are often associated with barrier beaches, islands, reefs and bars;

(v) Wetlands which serve as valuable storage areas for storm and flood waters;

(vi) Wetlands which are prime natural recharge areas. Prime recharge areas are locations where surface and ground water are directly interconnected; and

(vii) Wetlands through natural water filtration processes serve to purify water.

(3) Although a particular alteration of wetlands may constitute a minor change,

the cumulative effect of numerous such piecemeal changes often results in a major impairment of the wetland resources. Thus, the particular wetland site for which an application is made will be evaluated with the recognition that it is part of a complete and interrelated wetland area. In addition, the District Engineer may undertake reviews of particular wetland areas in consultation with the appropriate Regional Director of the Fish and Wildlife Service, the Regional Director of the National Marine Fisheries Service of the National Oceanic and Atmospheric Administration, the Regional Administrator of the Environmental Protection Agency, the local representative of the Soil Conservation Service of the Department of Agriculture, and the head of the appropriate State agency to assess the cumulative effect of activities in such areas.

(4) No permit will be granted to work in wetlands identified as important by subparagraph (2), above, unless the District Engineer concludes, on the basis of the analysis required in paragraph (a), above, that the benefits of the proposed alteration outweigh the damage to the wetlands resource and the proposed alteration is necessary to realize those benefits. In evaluating whether a particular alteration is necessary, the District Engineer shall consider whether the proposed activity is primarily dependent on being located in, or in close proximity to the aquatic environment and whether feasible alternative sites are available. The applicant must provide sufficient information on the need to locate the proposed activity in the wetland and must provide data on the basis of which the availability of feasible alternative sites can be evaluated.

(5) In addition to the policies expressed in this subpart the Congressional policy expressed in the Estuary Protection Act, PL 90–454, and State regulatory laws or programs for classification and protection of wetlands will be given great weight.

(c) *Fish and wildlife.* In accordance with the Fish and Wildlife Coordination Act (§ 320.3(e) above) Corps of Engineers officials will consult with the Regional Director, U.S. Fish and Wildlife Service, the Regional Director, National Marine Fisheries Service, and the head of the agency responsible for fish and wildlife for the State in which the work is to be performed, with a view to the conservation of wildlife resources by prevention of their direct and indirect loss and damage due to the activity proposed in a permit application. They will give great weight to these views on fish and wildlife considerations in evaluating the application. The applicant will be urged to modify his proposal to eliminate or mitigate any damage to such resources, and in appropriate cases the permit may be conditioned to accomplish this purpose.

(d) *Water quality.* Applications for permits for activities which may affect the quality of a water of the United States will be evaluated for compliance with applicable effluent limitations, water quality standards, and management practices during the construction, operation, and maintenance of the proposed activity. Certification of compliance with applicable effluent limitations and water quality standards required under provisions of Section 401 of the Federal Water Pollution Control Act will be considered conclusive with respect to water quality considerations unless the Regional Administrator, Environmental Protection Agency (EPA), advises of other water quality aspects to be taken into consideration. Any permit issued may be conditioned to implement water quality protection measures.

(e) *Historic, scenic, and recreational values.* (1) Applications for permits covered by this regulation may involve areas which possess recognized historic, cultural, scenic, conservation, recreational or similar values. Full evaluation of the general public interest requires that due consideration be given to the effect which the proposed structure or activity may have on the enhancement, preservation, or development of such values. Recognition of those values is often reflected by State, regional, or local land use classifications, or by similar Federal controls or policies. In both cases, action on permit applications should, insofar as possible, be consistent with, and avoid adverse effect on, the values or purposes for which those classifications, controls, or policies were established.

(2) Specific application of the policy in subparagraph (1) above, applies to:

(i) Rivers named in Section 3 of the Wild and Scenic Rivers Act (82 Stat. 906, 16 U.S.C. 1273 et seq.); those proposed for inclusion as provided by Sections 4 and 5 of the Act, or by later legislation; and wild, scenic, and recreational rivers established by State and local entities;

(ii) Historic, cultural, or archeological sites or practices as provided in the National Historic Preservation Act of 1966 (83 Stat. 852, 42 U.S.C. 4321 et seq.) (see also Executive Order 11593, May 13, 1971, and Statutes there cited). Particular attention should be directed toward any district, site, building, structure, or object listed or eligible for listing in the National Register of Historic Places;

(iii) Sites included in or determined eligible for listing in the National Registry of Natural Landmarks which are published periodically in the FEDERAL REGISTER;

(iv) Sites acquired or developed with the assistance of the Land and Water Conservation Fund (78 Stat. 897, 16 U.S.C. 460, 1–4, et seq.) or the Recreational Demonstrations Projects Act of 1942 (PL 77–594, 56 Stat. 326) and other public parks and recreation areas; and

(v) Any other areas named in Acts of Congress or Presidential Proclamations as National Rivers, National Wilderness Areas, National Seashores, National Recreation Areas, National Lakeshores, National Parks, National Monuments, and such areas as may be established under Federal law for similar and related purposes, such as estuarine and marine sanctuaries.

(f) *Effect on limits of the territorial sea.* Structures or work affecting coastal waters may modify the coast line or base line from which the three mile belt is measured for purposes of the Submerged Lands Act and International Law. Generally, the coast line or base line is the line of ordinary low water on the mainland; however, there are exceptions where there are islands or lowtide elevations offshore. (The Submerged Lands Act, 67 Stat. 29, U.S. Code Section 1301(c), and United States vs. California, 381 U.S. 139 (1965), 382 U.S. 448 (1966).) All applications for structures or work affecting coastal waters will therefore be reviewed specifically to determine whether the coast line or base line might be altered. If it is determined that such a change might occur, coordination with the Attorney General and the Solicitor of the Department of the Interior is required before final action is taken. The District Engineer will submit a description of the proposed work and a copy of the plans to the Solicitor, Department of the Interior, Washington, D.C. 20240, and request his comments concerning the effects of the proposed work on the outer continental rights of the United States. These comments will be included in the file of the application. After completion of standard processing procedures, the file will be forwarded to the Chief of Engineers. The decision on the application will be made by the Secretary of the Army after coordination with the Attorney General.

(g) *Interference with adjacent properties or water resource projects.* Authorization of work or structures by the Department of the Army does not convey a property right, nor authorize any injury to property or invasion of other rights.

(1) Because a landowner has the general right to protect his property from erosion, applications to erect protective structures will usually receive favorable consideration. However, if the protective structure may cause damage to the property of others, the District Engineer will so advise the applicant and inform him of possible alternative methods of protecting his property. Such advice will be given in terms of general guidance only so as not to compete with private engineering firms nor require undue use of government resources. A significant probability of resulting damage to nearby properties can be a basis for denial of an application.

(2) A landowner's general right of access to navigable waters of the United States is subject to the similar rights of access held by nearby landowners and to the general public's right of navigation on the water surface. Proposals which create undue interference with access to, or use of, navigable waters will generally not receive favorable consideration.

(3) Where it is found that the work for which a permit is desired is in navigable waters of the United States (see 33 CFR Part 329) and may interfere with an authorized Federal project, the applicant should be apprised in writing

of the fact and of the possibility that a Federal project which may be constructed in the vicinity of the proposed work might necessitate its removal or reconstruction. The applicant should also be informed that the United States will in no case be liable for any damage or injury to the structures or work authorized by Sections 9 or 10 of the River and Harbor Act of 1899 (see 33 CFR Parts 321 and 322) which may be caused by or result from future operations undertaken by the Government for the conservation or improvement of navigation, or for other purposes, and no claims or right to compensation will accrue from any such damage.

(4) Proposed activities which are in the area of a Federal project which exists or is under construction will be evaluated to insure that they are compatible with the purposes of the project.

(h) *Activities affecting coastal zones.* Applications for Department of the Army permits for activities affecting the coastal zones of those States having a coastal zone management program approved by the Secretary of Commerce will be evaluated with respect to compliance with that program. No permit will be issued to a non-Federal applicant until certification has been provided that the proposed activity complies with the coastal zone management program and the appropriate State agency has concurred with the certification or has waived its right to do so. However, a permit may be issued to a non-Federal applicant if the Secretary of Commerce, on his own initiative or upon appeal by the applicant, finds that the proposed activity is consistent with the objectives of the Coastal Zone Management Act of 1972 or is otherwise necessary in the interest of national security. Federal agency applicants for Department of the Army permits are responsible for complying with the Coastal Zone Management Act's directives for assuring that their activities directly affecting the coastal zone are consistent, to the maximum extent practicable, with approved State coastal zone management programs.

(i) *Activities in marine sanctuaries.* Applications for Department of the Army authorization for activities in a marine sanctuary established by the Secretary of Commerce under authority of Section 302 of the Marine Protection, Research and Sanctuaries Act of 1972, as amended, will be evaluated for impact on the marine sanctuary. No permit will be issued until the applicant provides a certification from the Secretary of Commerce that the proposed activity is consistent with the purposes of Title III of the Marine Protection, Research and Sanctuaries Act of 1972, as amended, and can be carried out within the regulations promulgated by the Secretary of Commerce to control activities within the marine sanctuary. Authorizations so issued will contain such special conditions as may be required by the Secretary of Commerce in connection with his certification.

(j) *Other Federal, state, or local requirements.* (1) Processing of an application for a Department of the Army permit normally will proceed concurrently with the processing of other required Federal, State, and/or local authorizations or certification. Where the required Federal State and/or local certification and/or authorization has been denied, the application for a Department of the Army permit will be denied without prejudice to the right of the applicant to reinstate processing of his application if subsequent approval is received from the appropriate Federal, State and/or local agency. Even if official certification and/or authorization is not required by State or Federal law, but a State, regional, or local agency having jurisdiction or interest over the particular activity comments on the application, due consideration shall be given to those official views as a reflection of local factors of the public interest.

(2) Where officially adopted State, regional, or local land-use classifications, determinations, or policies are applicable to the land or water areas under consideration, they shall be presumed to reflect local factors of the public interest and shall be considered in addition with the other national factors of the public interest identified in § 320.4(a).

(3) A proposed activity may result in conflicting comments from several agencies within the same State. While many States have designated a single State agency or individual to provide a single and coordinated State position regarding pending permit applications, where a State has not so designated a single source, District Engineers will elicit from the Governor an expression of his views and desires concerning the application or, in the alternative, an expression from the Governor as to which State agency represents the official State position in this particular case.

(4) In the absence of overriding national factors of the public interest that may be revealed during the processing of the permit application, a permit will generally be issued following receipt of a favorable State determination provided the concerns, policies, goals, and requirements as expressed in 33 CFR Parts 320–324, and the following statutes have been followed and considered: The National Environmental Policy Act; the Fish and Wildlife Coordination Act; the Historical and Archaeological Preservation Act; the National Historic Preservation Act; the Endangered Species Act; the Coastal Zone Management Act; the Marine Protection, Research and Sanctuaries Act of 1972, as amended; and the Federal Water Pollution Control Act (see § 320.3, above).

(5) If the responsible Federal, State, and/or local agency fails to take definitive action to grant or deny required authorizations or to furnish comments as provided in subparagraph (3) above, within three months of the issuance of the public notice, the District Engineer shall process the application to a conclusion.

(6) Permits will not be issued where certification or authorization of the proposed work is required by Federal, State and/or local law and that certification or authorization has been denied.

(7) The District Engineer may, in those States with ongoing permit programs for activities regulated by Department of the Army permits, enter into an agreement with the States to jointly process and evaluate Department of the Army and State permit applications. This may include the issuance of joint public notices; the conduct of joint public hearings, if held; and the joint review and analysis of information and comments developed in response to the public notice, public hearing, the environmental assessment and the environmental impact statement (if necessary), the Fish and Wildlife Coordination Act, the Historical and Archaeological Preservation Act, the National Historic Preservation Act, the Endangered Species Act, the Coastal Zone Management Act, the Marine Protection, Research and Sanctuaries Act of 1972, as amended, and the Federal Water Pollution Control Act. In such cases, applications for Department of the Army permits may be processed concurrently with the processing of the State permit to an independent conclusion and decision by the District Engineer and appropriate State agency.

(k) *Safety of impoundment structures.* Unless an adequate inspection program is required by another Federal licensing agency or will be performed by another Federal agency, the District Engineer will condition permits for impoundment structures to require that the permittee operate and maintain the structure properly to insure public safety. The District Engineer may condition such permits to require periodic inspections and to indicate that failure to accomplish actions to assure the public safety will be considered cause to revoke the permit.

(l) *Floodplains.* Executive Order 11988, dated May 24, 1977, requires each Federal agency, in its conduct of Federal programs that affect land use including the regulation of water resources, to take action to reduce the risk of flood loss; to minimize the impact of floods on human safety, health and welfare; and to restore and preserve the natural and beneficial values served by floodplains. In evaluating whether activities located in a floodplain that require Department of the Army permits are in the public interest, available alternatives to avoid adverse effects from and incompatible development in floodplains shall be considered.

PART 321—PERMITS FOR DAMS AND DIKES IN NAVIGABLE WATERS OF THE UNITED STATES

Sec.
321.1 General.
321.2 Definitions.
321.3 Special policies and procedures.

AUTHORITY: 33 U.S.C. 401.

§ 321.1 General.

This regulation prescribes, in addition to the general policies of 33 CFR 320.4 and procedures of 33 CFR Part 325, those special policies, practices, and procedures to be followed by the Corps of En-

gineers in connection with the review of applications for Department of Army permits to authorize the construction of a dike or dam in a navigable water of the United States pursuant to Section 9 of the River and Harbor Act of 1899 (33 U.S.C. 401). See 33 CFR 320.2(a). Dams and dikes in navigable waters of the United States also require Department of the Army permits under Section 404 of the Federal Water Pollution Control Act Amendments of 1972 (33 U.S.C. 1344). Applicants for Department of the Army permits under this Part should also refer to 33 CFR Part 323 to satisfy the requirements of Section 404.

§ 321.2 Definitions.

For the purpose of this regulation, the following terms are defined:

(a) The term "navigable waters of the United States" means those waters of the United States that are subject to the ebb and flow of the tide shoreward to the mean high water mark (mean higher high water mark on the Pacific coast), and/or are presently used, or have been used in the past, or may be susceptible to use to transport interstate or foreign commerce. See 33 CFR Part 329 for a more complete definition of this term.

(b) The term "dam" means an impoundment structure that completely spans a navigable water of the United States and that may obstruct interstate waterborne commerce.

(c) The term "dike" means an embankment, low dividing wall, or other protective barrier that completely spans a navigable water of the United States and that may obstruct interstate waterborne commerce.

§ 21.3 Special policies and procedures.

The following additional special policies and procedures shall be applicable to the evaluation of permit applications under this regulation:

(a) The Secretary of the Army will decide whether Department of the Army authorization for a dam or dike in a navigable water of the United States will be issued, since this authority has not been delegated to the Chief of Engineers. The conditions to be imposed in any instrument of authorization will be recommended by the District Engineer when he forwards his report to the Secretary of the Army, through the Chief of Engineers, pursuant to 33 CFR 325.11.

(b) A Department of the Army application under Section 9 will not be processed until the approval of the United States Congress has been obtained if the navigable water of the United States is an interstate waterbody, or until the approval of the appropriate State legislature has been obtained if the navigable water of the United States is solely within the boundaries of one State.

PART 322—PERMITS FOR STRUCTURES OR WORK IN OR AFFECTING NAVIGABLE WATERS OF THE UNITED STATES

Sec.

AUTHORITY: 33 U.S. 403.

§ 322.1 General.

This regulation prescribes, in addition to the general policies of 33 CFR 320.4 and procedures of 33 CFR Part 325 those special policies, practices and procedures to be followed by the Corps of Engineers in connection with the review of applications for Department of Army permits to authorize structures or work in or affecting navigable waters of the United States pursuant to Section 10 of the River and Harbor Act of 1899 (33 U.S.C. 403) (hereinafter referred to as Section 10). See 33 CFR 320.2(b). Certain structures or work in or affecting navigable waters of the United States are also regulated under other authorities of the Department of the Army. These include discharges of dredged or fill material into waters of the United States, including the territorial seas, pursuant to Section 404 of the Federal Water Pollution Control Act Amendments of 1972 (33 U.S.C. 1344; see 33 CFR Part 323) and the transportation of dredged material by vessel for purposes of dumping in ocean waters, including the territorial seas, pursuant to Section 103 of the Marine Protection, Research and Sanctuaries Act of 1972, as amended (33 U.S.C. 1413; see 33 CFR Part 324). A Department of the Army permit will also be required under these additional authorities if they are applicable to structures or work in or affecting navigable waters of the United States. Applicants for Department of the Army permits under this part should refer to the other cited authorities and implementing regulations for these additional permit requirements to determine whether they also are applicable to their proposed activities.

§ 322.2 Definitions.

For the purpose of this regulation, the following terms are defined:

(a) The term "navigable waters of the United States" means those waters of the United States that are subject to the ebb and flow of the tide shoreward to the mean high water mark (mean higher high water mark on the Pacific coast), and/or are presently used, or have been used in the past, or may be susceptible to use to transport interstate or foreign commerce. See 33 CFR Part 329 for a more complete definition of this term.

(b) The term "structure" shall include, without limitation, any pier, wharf, dolphin, weir, boom, breakwater, bulkhead, revetment, jetty, permanent mooring structure, power transmission lines, permanently moored floating vessels, piling, aids to navigation, or any other permanent or semi-permanent obstacle or obstruction.

(c) The term "work" shall include, without limitation, any dredging or disposal of dredged material, excavation, filling, or other modification of a navigable water of the United States.

(d) The term "letter of permission" means an individual permit issued in accordance with the abbreviated procedures of 33 CFR 325.5(b).

(e) The term "individual permit" means a Department of the Army authorization that is issued following a case-by-case evaluation of a specific structure or work in accordance with the procedures of this regulation and 33 CFR Part 325 and a determination that the proposed structure or work is in the public interest pursuant to 33 CFR Part 320.

(f) The term "general permit" means a Department of the Army authorization that is issued for a category or categories of structures or work in a specified region of the country, when those structures or work are substantially similar in nature and cause only minimal individual and cumulative adverse environmental impact. A general permit is issued following an evaluation of the proposed category of activities that it will authorize in accordance with the procedures of this regulation (322.5(b)), 33 CFR Part 325, and a determination that the proposed discharges will be in the public interest pursuant to 33 CFR Part 320.

(g) The term "nationwide permit" means a Department of the Army authorization that has been issued by this regulation in § 322.4 to permit certain structures or work in or affecting navigable waters of the United States throughout the Nation.

§ 322.3 Activities requiring permits.

(a) *General.* Department of the Army permits are required under Section 10 for all structures or work in or affecting navigable waters of the United States except for bridges and causeways (see Appendix A) and structures or work licensed under the Federal Power Act of 1920. Activities that were commenced or completed shoreward of established Federal harbor lines before May 27, 1970 (see 33 CFR Part 328) also do not require Section 10 permits; however, if those activities involve the discharge of dredged or fill material into waters of the United States after October 18, 1972, a Section 404 permit is required (see 33 CFR Part 323).

(1) Structures or work are in the navigable waters of the United States if they are within limits defined in 33 CFR Part 329. Structures or work outside these limits are subject to the provisions of law cited in paragraph (a) above, if these structures or work affect the course, location, or condition of the waterbody in such a manner as to impact on the navigable capacity of the waterbody. For purposes of a Section 10 permit, a tunnel or other structure under or over a navigable water of the United States is considered to have an impact on the navigable capacity of the waterbody.

(2) Pursuant to Section 154 of the Water Resource Development Act of 1976 (PL 94-587), Department of the Army permits will not be required under Section 10 to construct wharves and piers in any waterbody, located entirely within one State, that is a navigable water of

the United States solely on the basis of its historical use to transport interstate commerce. Section 154 applies only to the construction of a single pier or wharf and not to marinas. Furthermore, Section 154 is not applicable to any pier or wharf that would cause an unacceptable impact on navigation.

(b) *Outer continental shelf.* Department of the Army permits will also be required for the construction of artificial islands and fixed structures on the outer continental shelf pursuant to Section 4(f) of the Outer Continental Shelf Lands Act (see 33 CFR 320.2(b)).

(c) *Activities of Federal agencies.* Except as specifically provided in this subparagraph, activities of the type described in (a) and (b), above, done by or on behalf of any Federal agency, other than any work or structures in or affecting navigable waters of the United States that are part of the Civil Works activities of the Corps of Engineers, are subject to the authorization procedures of this regulation. Agreement for construction or engineering services performed for other agencies by the Corps of Engineers does not constitute authorization under this regulation. Division and District Engineers will therefore advise Federal agencies accordingly, and cooperate to the fullest extent in expediting the processing of their applications.

(1) Congress has delegated to the Secretary of the Army and the Chief of Engineers in Section 10 the duty to authorize or prohibit certain work or structures in navigable waters of the United States. The general legislation by which Federal agencies are empowered to act generally is not considered to be sufficient authorization by Congress to satisfy the purposes of Section 10. If an agency asserts that it has Congressional authorization meeting the test of Section 10 or would otherwise be exempt from the provisions of Section 10, the legislative history and/or provisions of the Act should clearly demonstrate that Congress was approving the exact location and plans from which Congress could have considered the effect on navigable waters of the United States or that Congress intended to exempt that agency from the requirements of Section 10. Very often such legislation reserves final approval of plans or construction for the Chief of Engineers. In such cases evaluation and authorization under this regulation are limited by the intent of the statutory language involved.

(2) The policy provisions set out in 33 CFR 320.4(j) relating to State or local certifications and/or authorizations, do not apply to work or structures undertaken by Federal agencies, except where compliance with non-Federal authorization is required by Federal law or Executive policy.

§ 322.4 Structures and work permitted by this regulation.

The following structures or work are hereby permitted for purposes of Section 10 and do not require separate Department of the Army permits:

(a) The placement of aids to navigation by the U.S. Coast Guard; see § 322.5 (e), below;

(b) Structures constructed in artificial canals within principally residential developments where the connection of the canal to a navigable water of the United States has been previously authorized; See § 322.5(g), below;

(c) The repair, rehabilitation, or replacement of any previously authorized, currently serviceable, structure or of any currently serviceable structure constructed prior to the requirement for authorization; provided such repair, rehabilitation, or replacement does not result in a deviation from the plans of the original structure, and further provided that the structure to be maintained has not been put to uses differing from uses specified for it in any permit authorizing its original construction;

(d) Marine life harvesting devices such as pound nets, crab traps, eel pots, lobster traps, provided there is no inteference with navigation;

(e) Staff gages, tide gages, water recording devices, water quality testing and improvement devices, and similar scientific structures provided there is no interference with navigation;

(f) Survey activities including core sampling; and

(g) Structures or work completed before 18 December 1968 or in waterbodies over which the District Engineer has not asserted jurisdiction provided there is no interference with navigation.

§ 322.5 Special policies.

The Secretary of the Army has delegated to the Chief of Engineers the authority to issue or deny Section 10 permits. (See Appendix B). The following additional special policies and procedures shall also be applicable to the evaluation of permit applications under this regulation.

(a) *General.* Department of the Army permits will be required for structures or work in or affecting navigable waters of the United States. Certain structures or work specified in § 322.4 are permitted by this regulation. If a structure or work is not permitted by this regulation, an individual or general Section 10 permit will be required.

(b) *General Permits.* The District Engineer may, after compliance with the other procedures of 33 CFR Part 325, issue general permits for certain clearly described categories of structures or work, requiring Department of the Army permits. After a general permit has been issued, individual activities falling within those categories will not require individual permit processing by the procedures of 33 CFR Part 325 unless the District Engineer determines, on a case-by-case basis, that the public interest requires such individual review.

(1) District Engineers will include only those activities that are substantially similar in nature, that cause only minimal adverse environmental impact when performed separately, and that will have only a minimal adverse cumulative effect on the environment as categories which are candidates for general permits.

(2) In addition to the conditions prescribed in Appendix C of 33 CFR Part 325, any general permit issued by the District Engineer shall prescribe the following conditions:

(i) The maximum quantity of material that may be discharged and the maximum area that may be modified by structures or work that are authorized for a single or incidental operation (if applicable);

(ii) A description of the category or categories of activities included in the general permit; and

(iii) The type of water(s) into which the activity may occur.

(3) The District Engineer may require reporting procedures.

(4) A general permit may be revoked if it is determined that the cumulative effects of the activities authorized by it will have an adverse impact on the public interest provided the procedures of 33 CFR 325.7 are followed. Following revocation, application for any future activities in areas covered by the general permit shall be processed as applications for individual permits.

(c) *Non-Federal dredging for navigation.*—(1) The benefits which an authorized Federal navigation project are intended to produce will often require similar and related operations by non-Federal agencies (e.g., dredging an access channel to dock and berthing facilities or deepening such a channel to correspond to the Federal project depth). These non-Federal activities will be considered by Corps of Engineers officials in planning the construction and maintenance of Federal navigation projects and, to the maximum practical extent, will be coordinated with interested Federal, State, regional and local agencies and the general public simultaneously with the associated Federal projects. Non-Federal activities which are not so coordinated will be individually evaluated in accordance with this regulation. In evaluating the public interest in connection with applications for permits for such coordinated operations, equal treatment will, therefore, be accorded to the fullest extent possible to both Federal and non-Federal operations. Furthermore, permits for non-Federal dredging operations will contain conditions requiring the permittee to comply with the same practices or requirements utilized in connection with related Federal dredging operations with respect to such matters as turbidity, water quality, containment of material, nature and location of approved spoil disposal areas (non-Federal use of Federal contained, disposal areas will be in accordance with laws authorizing such areas and regulations governing their use), extent and period of dredging, and other factors relating to protection of environmental and ecological values.

(2) A permit for the dredging of a channel, slip, or other such project for navigation will also authorize the periodic maintenance dredging of the

project. Authority for maintenance dredging will be subject to revalidation at regular intervals to be specified in the permit. Revalidation will be in accordance with the procedures prescribed in 33 CFR 325.6. The permit, however, will require the permittee to give advance notice to the District Engineer each time maintenance dredging is to be performed. Where the maintenance dredging involves the discharge of dredged material into waters of the United States or the transportation of dredged material for the purpose of dumping in the ocean waters, the procedures in 33 CFR Parts 323 and 324 respectively shall also be followed.

(d) *Structures for small boats.* As a matter of policy, in the absence of overriding public interest, favorable consideration will generally be given to applications from riparian owners for permits for piers, boat docks, moorings, platforms and similar structures for small boats. Particular attention will be given to the location and general design of such structures to prevent possible obstructions to navigation with respect to both the public's use of the waterway and the neighboring proprietors' access to the waterway. Obstructions can result from both the existence of the structure, particularly in conjunction with other similar facilities in the immediate vicinity, and from its inability to withstand wave action or other forces which can be expected. District Engineers will inform applicants of the hazards involved and encourage safety in location, design and operation. Corps of Engineers officials will also encourage cooperative or group use facilities in lieu of individual proprietor use facilities.

(1) Letters transmitting permits for structures for small boats will, where applicable, include the following language: "Notice is hereby given that a possibility exists that the structure permitted may be subject to damage by wave wash from passing vessels. Your attention is invited to special condition _____ of the permit." The appropriate designation of the permit condition placing responsibility on the permittee and not on the United States for integrity of the structure and safety of boats moored thereto will be inserted.

(2) Floating structures for small recreational boats or other recreational purposes in lakes controlled by the Corps of Engineers under a Resources Manager are normally subject to permit authorities cited in § 322.3, above, when those waters are regarded as navigable waters of the United States. However, such structures will not be authorized under this regulation but will be regulated under applicable regulations of the Chief of Engineers published in 36 CFR 327.19 if the land surrounding those lakes is under complete Federal ownership. District Engineers will delineate those portions of the navigable waters of the United States where this provision is applicable and post notices of this designation in the vicinity of the lake Resources Manager's office.

(e) *Aids to navigation.* The placing of fixed and floating aids to navigation in a navigable water of the United States is within the purview of Section 10 of the River and Harbor Act of 1899. Furthermore, these aids are of particular interest to the U.S. Coast Guard because of their control of marking, lighting and standardization of such navigation aids. Applications for permits for installation of aids to navigation will, therefore, be coordinated with the appropriate District Commander, U.S. Coast Guard, and permits for such aids will include a condition to the effect that the permittee will conform to the requirements of the Coast Guard for marking, lighting, etc. Since most fixed and floating aids to navigation will not ordinarily significantly affect environmental values, the usual form of authorization to be used will be a letter of permission (See 33 CFR 325.1(b)).

(f) *Outer continental shelf.* Artificial islands and fixed structures located on the outer continental shelf are subject to the standard permit procedures of this regulation. Where the islands or structures are to be constructed on lands which are under mineral lease from the Bureau of Land Management, Department of the Interior, that agency, in cooperation with other Federal agencies, fully evaluates the potential effect of the leasing program on the total environment. Accordingly, the decision whether to issue a permit on lands which are under mineral lease from the Department of the Interior will be limited to an evaluation of the impact of the proposed work on navigation and national security. The public notice will so identify the criteria.

(g) *Canals and other artificial waterways connected to navigable waters of the United States.* (1) A canal or similar artificial waterway is subject to the regulatory authorities discussed in § 322.3, above, if it constitutes a navigable water of the United States, or if it is connected to navigable waters of the United States in a manner which affects their course, condition, or capacity. In all cases the connection to navigable waters of the United States requires a permit. Where the canal itself constitutes a navigable water of the United States, evaluation of the permit application and further exercise of regulatory authority will be in accordance with the standard procedures of this regulation. For all other canals the exercise of regulatory authority is restricted to those activities which affect the course, condition, or capacity of the navigable waters of the United States. Examples of the latter may include the length and depth of the canal; the currents, circulation, quality and turbidity of its waters, especially as they affect fish and wildlife values; and modifications or extensions of its configuration.

(2) The proponent of canal work should submit his application for a permit, including a proposed plan of the entire development, and the location and description of anticipated docks, piers and other similar structures which will be placed in the canal, to the District Engineer before commencing any form of work. If the connection to navigable waters of the United States has already been made without a permit, the District Engineer will proceed in accordance with 33 CFR Part 326. Where a canal connection is planned, an application for a Section 10 permit should be made at the earliest stage of planning. Where the canal construction has already begun, the District Engineer will, in writing, advise the proponent of the need for a permit to connect the canals to navigable waters of the United States. He will also ask the proponent if he intends to make such a connection and will request the immediate submission of the plans and permit application if it is so intended. The District Engineer will also advise the proponent that any work is done at the risk that, if a permit is required, it may not be issued, and and that the existence of partially completed excavation work will not be allowed to weigh favorably in evaluation of the permit application.

(h) *Facilities at the borders of the United States.* (1) The construction, operation, maintenance, or connection of facilities at the borders of the United States are subject to Executive control and must be authorized by the President, Secretary of State, or other delegated official.

(2) Applications for permits for the construction, operation, maintenance, or connection at the borders of the United States of facilities for the transmission of electric energy between the United States and a foreign country, or for the exportation or importation of natural gas to or from a foreign country, must be made to the Federal Power Commission. (Executive Order 10485, September 3, 1953, 16 U.S.C. 824(a)(e), 15 U.S.C. 717(b), and 18 CFR Parts 32 and 153).

(3) Applications for the landing or operation of submarine cables must be made to the Federal Communications Commission. (Executive Order 10530, May 10, 1954, 47 U.S.C. 34 to 39, and 47 CFR 1.766)

(4) The Secretary of State is to receive applications for permits for the construction, connection, operation, or maintenance, at the borders of the United States, of pipelines, conveyor belts, and similar facilities for the exportation or importation of petroleum products, coals, minerals, or other products to or from a foreign country; facilities for the exportation or importation of water or sewage to or from a foreign country; and monorails, aerial cable cars, aerial tramways and similar facilities for the transportation of persons or things, or both, to or from a foreign country. (Executive Order 11423, August 16, 1968.)

(5) A Department of the Army permit under Section 10 of the River and Harbor Act of 1899 is also required for all of the above facilities which affect the navigable waters of the United States, but in each case in which a permit has

been issued as provided above, the decision whether to issue the Department of the Army permit will be based primarily on factors of navigation, since the basic existence and operation of the facility will have been examined and permitted as provided by the Executive orders. Furthermore, in those cases where the construction, maintenance, or operation at the above facilities involves the discharge of dredged or fill material in waters of the United States or the transportation of dredged material for the purpose of dumping it into ocean waters, appropriate Department of the Army authorizations under Section 404 of the Federal Water Pollution Control Act or under Section 103 of the Marine Protection, Research and Sanctuaries Act of 1972, as amended, are also required (See 33 CFR Parts 323, 324).

(i) *Power transmission lines.* (1) Permits under Section 10 of the River and Harbor Act of 1899 are required for power transmission lines crossing navigable waters of the United States unless those lines are part of a water power project subject to the regulatory authorities of the Federal Power Commission under the Federal Water Power Act of 1920. If an application is received for a permit for lines which are part of a water power project, the applicant will be instructed to submit his application to the Federal Power Commission. If the lines are not part of a water power project, the application will be processed in accordance with the procedures prescribed in this regulation.

(2) The following minimum clearances are required for aerial electric power transmission lines crossing navigable waters of the United States. These clearances are related to the clearances over the navigable channel provided by existing fixed bridges, or the clearances which would be required by the U.S. Coast Guard for new fixed bridges, in the vicinity of the proposed power line crossing. The clearances are based on the low point of the line under conditions which produce the greatest sag, taking into consideration temperature, load, wind, length or span, and type of supports as outlined in the National Electrical Safety Code.

Minimum additional clearance above clearance required for bridges

Nominal system voltage kilovolt:	Feet [1]
115 and below	20
138	22
161	24
230	26
350	30
500	35
700	42
750 to 765	45

[1] Above clearance required for bridges.

(3) Clearances for communication lines, stream gaging cables, ferry cables, and other aerial crossings are usually required to be a minimum of ten feet above clearances required for bridges. Greater clearances will be required if the public interest so indicates.

(j) *Seaplane operations.* (1) Structures in navigable waters of the United States associated with seaplane operations require Department of the Army permits, but close coordination with the Federal Aviation Administration (FAA), Department of Transportation, is required on such applications.

(2) The FAA must be notified by an applicant whenever he proposes to establish or operate a seaplane base. The FAA will study the proposal and advise the applicant, District Engineer, and other interested parties as to the effects of the proposal on the use of airspace. The District Engineer will therefore refer any objections regarding the effect of the proposal on the use of airspace to the FAA, and give due consideration to their recommendations when evaluating the general public interest.

(3) If the seaplane base will serve air carriers licensed by the Civil Aeronautics Board, the applicant must receive an airport operating certificate from the FAA. That certificate reflects determination and conditions relating to the installation operation, and maintenance of adequate air navigation facilities and safety equipment. Accordingly, the District Engineer may, in evaluating the general public interest, consider such matters to have been primarily evaluated by the FAA.

(k) *Foreign Trade Zones.* The Foreign Trade Zones Act (48 Stat. 998–1003, 19 U.S.C. 81a to 81u, as amended) authorizes the establishment of foreign-trade zones in or adjacent to United States ports of entry under terms of a grant and regulations prescribed by the Foreign-Trade Zones Board. Pertinent regulations are published in 15 CFR Part 400. The Secretary of the Army is a member of the Board, and construction of a zone is under the supervision of the District Engineer. Laws governing the navigable waters of the United States remain applicable to foreign-trade zones, including the general requirements of this regulation. Evaluation by a District Engineer of a permit application may give recognition to the consideration by the Board of the general economic effects of the zone on local and foreign commerce, general location of wharves and facilities, and other factors pertinent to construction, operation, and maintenance of the zone.

APPENDIX A—U.S COAST GUARD/CHIEF OF ENGINEERS, MEMORANDUM OF AGREEMENT

1. PURPOSE AND AUTHORITY

A. The Department of Transportation Act, the Act of October 15, 1966, P.L. 89-670, transferred to and vested in the Secretary of Transportation certain functions, powers and duties previously vested in the Secretary of the Army and the Chief of Engineers. By delegation of authority from the Secretary of Transportation (49 CFR 1.46(c)) the Commandant, U.S. Coast Guard, has been authorized to exercise certain of these functions, powers and duties relating to bridges and causeways conferred by:

(1) The following provision of law relating generally to drawbridge operating regulations: Section 5 of the Act of August 18, 1894, as amended (28 Stat. 362; 33 U.S.C. 499);

(2) The following law relating generally to obstructive bridges: The Act of June 21, 1940, as amended (The Truman-Hobbs Act) (54 Stat. 497; 33 U.S.C. 511 et seq.);

(3) The following laws and provisions of law to the extent that they relate generally to the location and clearances of bridges and causeways in the navigable waters of the United States:

(a) Section 9 of the Act of March 3, 1899, as amended (30 Stat. 1151; 33 U.S.C. 401);

(b) The Act of March 23, 1906, as amended (34 Stat. 84; 33 U.S.C. 491 et seq.); and

(c) The General Bridge Act of 1946, as amended (60 Stat. 847; 33 U.S.C. 525 et seq.) except Sections 502(c) and 503.

B. The Secretary of the Army and The Chief of Engineers continue to be vested with broad and important authorities and responsibilities with respect to navigable waters of the United States, including, but not limited to, jurisdiction over excavation and filling, design flood flows and construction of certain structures in such waters, and the prosecution of waterway improvement projects.

C. The purposes of this agreement are:

(1) To recognize the common and mutual interest of the Chief and Engineers and the Commandant, U.S. Coast Guard, in the orderly and efficient administration of their respective responsibilities under certain Federal statutes to regulate certain activities in navigable waters of the United States;

(2) To clarify the areas of jurisdiction and the responsibilities of the Corps of Engineers and the Coast Guard with respect to:

(a) The alteration of bridges,

(1) In connection with Corps of Engineers waterway improvement projects, and

(2) Under the Truman-Hobbs Act;

(b) The construction, operation and maintenance of bridges and causeways as distinguished from other types of structures over or in navigable waters of the United States;

(c) The closure of waterways and the restriction of passage through or under bridges in connection with their construction, operation, maintenance and removal; and

(d) The selection of an appropriate design flood flow for flood hazard analysis of any proposed water opening.

(3) To provide for coordination and consultation on projects and activities in or affecting the navigable waters of the United States.

In furtherance of the above purposes the undersigned do agree upon the definitions, policies and procedures set forth below.

2. ALTERATION OF BRIDGES IN OR ACROSS NAVIGABLE WATERS WITHIN CORPS OF ENGINEERS PROJECTS

A. The Chief of Engineers agrees to advise and consult with the Commandant on navigation projects contemplated by the Corps of Engineers which require the alteration of bridges across the waterways involved in such projects. The Chief of Engineers also agrees to include in such project proposals the costs of alterations, exclusive of betterments, of all bridges within the limits of the designated project which after consultation with the Commandant he determines to require alteration to meet the needs of existing and prospective navigation. Under this concept the federal costs would be furnished under the project.

B. The Commandant of the Coast Guard agrees to undertake all actions and assumes all responsibilities essential to the determination of navigational requirements for horizontal and vertical clearances of bridges across navigable waters necessary in connection with any navigation project by the Chief of Engineers. Further, the Commandant agrees to conduct all public proceedings necessary thereto and establish guide clearance criteria where needed for the project objectives.

3. ALTERATION OF BRIDGES UNDER THE TRUMAN-HOBBS ACT

The Commandant of the Coast Guard acknowledges and affirms the responsibility of the Coast Guard, under the Truman-Hobbs Act, to program and fund for the alteration of bridges which, as distinct from project related alterations described in paragraph 2 herein, become unreasonable obstructions to navigation as a result of factors or changes in the character of navigation and this agreement shall in no way affect, impair or modify the powers or duties conferred by that Act.

4. APPROVAL, ALTERATION AND REMOVAL OF OTHER BRIDGES AND CAUSEWAYS

A. *General Definitions.* For purposes of this Agreement and the administration of the statutes cited in 1.A.(3) above, a "bridge" is any structure over, on or in the navigable waters of the United States which (1) is used for the passage or conveyance of persons, vehicles, commodities and other physical matter and (2) is constructed in such a manner that either the horizontal or vertical clearance, or both, may affect the passage of vessels or boats through or under the structure. This definition includes, but is not limited to, highway bridges, railroad bridges, foot bridges, aqueducts, aerial tramways and conveyors, overhead pipelines and similar structures of like function together with their approaches, fenders, pier protection systems, appurtenances and foundations. This definition does not include aerial power transmission lines, tunnels, submerged pipelines and cables, dams, dikes, dredging and filling in, wharves, piers, breakwaters, bulkheads, jetties and similar structures and works (except as they may be integral features of a bridge and used in its construction, maintenance, operation or removal; or except when they are affixed to the bridge and will have an effect on the clearances provided by the bridge) over which jurisdiction remains with the Department of the Army and the Corps of Engineers under Sections 9 and 10 of the Act of March 3, 1899, as amended (33 U.S.C. 401 and 403). A "causeway" is a raised road across water or marshy land, with the water or marshy land on both sides of the road, and which is constructed in or affects navigation, navigable waters and design flood flows.

B. *Combined Structures and Appurtenances.* For purposes of the Acts cited in 1.A.(3) above, a structure serving more than one purpose and having characteristics of either a bridge or causeway, as defined in 4.A., and some other structure, shall be considered as a bridge or causeway when the structure in its entirety, including its appurtenances and incidental features, has or retains the predominant characteristics and purpose of a bridge or causeway. A structure shall not be considered a bridge or causeway when its primary and predominant characteristics and purpose are other than those set forth above and it meets the general definitions above only in a narrow technical sense as a result of incidental features. This interpretation is intended to minimize the number of instances which will require an applicant for a single project to secure a permit or series of permits from both the Department of Transportation and the Department of the Army for each separate feature or detail of the project when it serves, incidentally to its primary purpose, more than one purpose and has features of either a bridge or causeway and features of some other structure. However, if parts of the project are separable and can be fairly and reasonably characterized or classified in an engineering sense as separate structures, each such structure will be so treated and considered for approval by the agency having jurisdiction thereover.

C. *Alteration of the Character of Bridges and Causeways.* The jurisdiction of the Secretary of Transportation and the Coast Guard over bridges and causeways includes authority to approve the removal of such structures when the owners thereof desire to discontinue their use. If the owner of a bridge or causeway discontinues its use and wishes to remove or alter any part thereof in such a manner that it will lose its character as a bridge or causeway, the Coast Guard will normally require removal of the structure from the waterway in its entirety. However, if the owner of a bridge or a causeway wishes to retain it in whole or in part for use other than for operation and maintenance as a bridge or causeway, the proposed structure will be considered as coming within the jurisdiction of the Corps of Engineers. The Coast Guard will refer requests for such uses to the Corps of Engineers for consideration. The Corps of Engineers agrees to advise the Commandant of the receipt of an application for approval of the conversion of a bridge or causeway to another structure and to provide opportunity for comment thereon. If the Corps of Engineers approves the conversion of a bridge or causeway to another structure, no residual jurisdiction over the structure will remain with the Coast Guard. However, if the Corps of Engineers does not approve the proposed conversion, then the structure remains a bridge subject to the jurisdiction of the Coast Guard.

5. CLOSURE OF WATERWAYS AND RESTRICTION OF PASSAGE THROUGH OR UNDER BRIDGES

Under the statutes cited in Section 1 of this Memorandum of Agreement, the Commandant must approve the clearances to be made available for navigation through or under bridges. It is understood that this duty and authority extends to and may be exercised in connection with the construction, alteration, operation, maintenance and removal of bridges, and includes the power to authorize the temporary restriction of passage through or under a bridge by use of falsework, piling, floating equipment, closure of draws, or any works or activities which temporary reduce the navigation clearances and design flood flows, including closure of any or all spans of the bridge. Moreover, under the Ports and Waterways Safety Act of 1972, Public Law 92-340, 86 Stat. 424, the Commandant exercises broad powers in waterways to control vessel traffic in areas he determines to be especially hazardous and to establish safety zones or other measures for limited controls or conditional access and activity when necessary to prevent damage to or the destruction or loss of, any vessel, bridge, or other structure on or in the navigable waters of the United States. Accordingly, in the event that work in connection with the construction, alteration or repair of a bridge or causeway is of such a nature that for the protection of life and property navigation through or in the vicinity of the bridge or causeway must be temporarily prohibited, the Coast Guard may close that part of the affected waterway while such work is being performed. However, it is also clear that the Secretary of the Army and the Chief of Engineers have the authority, under Section 4 of the Act of August 18, 1894, as amended, (33 U.S.C. 1) to prescribe rules for the use, administration and navigation of the navigable waters of the United States. In recognition of that authority, and pursuant to Section 102(c) of the Ports and Waterways Safety Act, the Coast Guard will consult with the Corps of Engineers when any significant restriction of passage through or under a bridge is contemplated to be authorized or a waterway is to be temporarily closed.

6. COORDINATION AND COOPERATION PROCEDURES

A. District Commanders, Coast Guard Districts, shall send notices of applications for permits for bridge or causeway construction, modification, or removal to the Corps of Engineers Divisions and Districts in which the bridge or causeway is located.

B. District Engineers, Corps of Engineers, shall send notices of applications for permits for other structures or dredge and fill work to local Coast Guard District Commanders.

C. In cases where proposed structures or modifications of structures do not clearly fall within one of the classifications set forth in paragraph 4.A. above, the application will be forwarded with recommendations of the reviewing officers through channels to the Chief of Engineers and the Commandant of the Coast Guard who shall, after mutual consultation, attempt to resolve the questions.

D. If the above procedures fail to produce agreement, the application will be forwarded to the Secretary of the Army and Secretary of Transportation for their determination.

E. The Chief of Engineers and the Commandant, Coast Guard pledge themselves to mutual cooperation and consultation in making available timely information and data, seeking uniformity and consistency among field offices, and providing timely and adequate review of all matters arising in connection with the administration of their responsibilities governed by the Acts cited herein.

Dated: March 21, 1973.

C. R. BENDER.

Dated: April 18 1973.

F. J. CLARKE.

APPENDIX B—DELEGATION OF AUTHORITY TO ISSUE OR DENY PERMITS FOR CONSTRUCTION OR OTHER WORK AFFECTING NAVIGABLE WATERS OF THE UNITED STATES

MAY 24, 1971.

Pursuant to the authority vested in me by the Act of March 3, 1899, c.425, Sections 10 and 14, 30 Stat. 1151, 1153, 33 U.S.C. Sections 403 and 408, and the Act of June 13, 1902, c.1079, Section 1, 32 Stat. 371, 33 U.S.C. Section 565, I hereby authorize the Chief of Engineers and his authorized representatives to issue or deny permits for construction or other work affecting navigable waters of the United States. Except in cases involving applications for permits for artificial islands or fixed structures on Outer Continental Shelf lands under mineral lease from the Department of the Interior, the Chief of Engineers shall, in exercising such authority, evaluate the impact of the proposed work on the public interest. In cases involving applications for permits for artificial islands or fixed structures on Outer Continental Shelf lands under mineral lease from the Department of the Interior, the Chief of Engineers shall, in exercising such authority, evaluate the impact of the proposed work on navigation and national security. The permits so granted may be made subject to such special conditions as the Chief of Engineers or his authorized representatives may consider necessary in order to effect the purposes of the above Acts.

The Chief of Engineers and his authorized representatives shall exercise the authority hereby delegated subject to such conditions as I or my authorized representative may from time to time impose.

STANLEY R. RESOR,
Secretary of the Army.

PART 323—PERMITS FOR DISCHARGES OF DREDGED OR FILL MATERIAL INTO WATERS OF THE UNITED STATES

Sec.

AUTHORITY: 33 U.S.C. 1344.

§ 323.1 General.

This regulation prescribes, in addition to the general policies of 33 CFR 320.4 and procedures of 33 CFR Part 325, those special policies, practices, and procedures to be followed by the Corps of Engineers in connection with the review of applications for Department of the Army permits to authorize the discharge of dredged or fill material into waters of the United States pursuant to Section 404 of the Federal Water Pollution Control Act Amendments of 1972 (33 U.S.C. 1344) (hereinafter referred to as Section 404). See 33 CFR 320.2(g). Certain discharges of dredged or fill material into waters of the United States are also regulated under other authorities of the Department of the Army. These include dams and dikes in navigable waters of the United States pursuant to Section 9 of the River and Harbor Act of 1899 (33 U.S.C. 401; see 33 CFR 321) and structures or work in or affecting navigable waters of the United States pursuant to Section 10 of the River and Harbor Act of 1899 (33 U.S.C. 403; see 33 CFR 322). A Department of the Army permit will also be required under these additional authorities if they are applicable to activities involving discharges of dredged or fill material into waters of the United States. Applicants for Department of the Army permits under this Part should refer to the other cited authorities and implementing regulations for these additional permit requirements to determine whether they also are applicable to their proposed activities.

§ 323.2 Definitions.

For the purpose of this regulation, the following terms are defined:

(a) The term "waters of the United States" means: [1]

(1) The territorial seas with respect to the discharge of fill material. (The transportation of dredged material by vessel for the purpose of dumping in the oceans, including the territorial seas, at an ocean dump site approved under 40 CFR 228 is regulated by Section 103 of the Marine Protection, Research and Sanctuaries Act of 1972, as amended (33 USC 1413). See 33 CFR 324. Discharges of dredged or fill material into the territorial seas are regulated by Section 404.);

(2) Coastal and inland waters, lakes, rivers, and streams that are navigable waters of the United States, including adjacent wetlands;

(3) Tributaries to navigable waters of the United States, including adjacent wetlands (manmade nontidal drainage and irrigation ditches excavated on dry land are not considered waters of the United States under this definition).

(4) Interstate waters and their tributaries, including adjacent wetlands; and

(5) All other waters of the United States not identified in paragraphs (1)–(4) above, such as isolated wetlands and lakes, intermittent streams, prairie potholes, and other waters that are not part of a tributary system to interstate waters or to navigable waters of the United States, the degradation or destruction of which could affect interstate commerce.[2]

The landward limit of jurisdiction in tidal waters, in the absence of adjacent wetlands, shall be the high tide line and the landward limit of jurisdiction an all other waters, in the absence of adjacent wetlands, shall be the ordinary high water mark.

(b) The term "navigable waters of the United States" means those waters of the United States that are subject to the ebb and flow of the tide shoreward to the mean high water mark (mean higher high water mark on the Pacific coast) and/or are presently used, or have been used in the past, or may be susceptible to use to transport interstate or foreign commerce. (See 33 CFR 329 for a more complete definition of this term.)

(c) The term "wetlands" means those areas that are inundated or saturated by surface or ground water at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions. Wetlands generally include swamps, marshes, bogs and similar areas.

(d) The term "adjacent" means bordering, contiguous, or neighboring. Wetlands separated from other waters of the United States by man-made dikes or barriers, natural river berms, beach dunes and the like are "adjacent wetlands."

(e) The term "natural lake" means a standing body of open water that occurs in a natural depression fed by one or more streams and from which a stream may flow, that occurs due to the widening or natural blockage of a river or stream, or that occurs in an isolated natural depression that is not a part of a surface river or stream.

(f) The term "impoundment" means a standing body of open water created by artificially blocking or restricting the flow of a river, stream, or tidal area. As used in this regulation, the term does not include artificial lakes or ponds created by excavating and/or diking dry land to collect and retain water for such purposes as stock watering, irrigation, settling basins cooling, or rice growing.

(g) The term "ordinary high water mark" means the line on the shore established by the fluctuations of water and indicated by physical characteristics such as a clear, natural line impressed on the bank; shelving; changes in the character of soil; destruction of terrestrial vegetation; the presence of litter and debris; or other appropriate means that consider the characteristics of the surrounding areas.

(h) The term "high tide line" means a line or mark left upon tide flats, beaches, or along shore objects that indicates the intersection of the land with the water's surface at the maximum height reached by a rising tide. The mark may be determined by a line of oil or scum along shore objects, a more or less continuous deposit of fine shell or debris on the foreshore or berm, other physical markings or characteristics, vegetation lines, tidal gages, or other suitable means that delineate the general height reached by a rising tide. The term includes spring high tides and other high tides that occur with periodic frequency, but does not include storm surges in which there is a departure from the normal or predicted reach of the tide due to the piling up of water against a coast

[1] The terminology used by the FWPCA is "navigable waters" which is defined in Section 502(7) of the Act as "waters of the United States including the territorial seas." For purposes of clarity, and to avoid confusion with other Corps of Engineers regulatory programs, the term "waters of the United States" is used throughout this regulation.

[2] In defining the jurisdiction of the FWPCA as the "waters of the United States," Congress, in the legislative history to the Act, specified that the term "be given the broadest constitutional interpretation unencumbered by agency determinations which would have been made or may be made for administrative purposes." The waters listed in paragraphs (a)(1)–4 fall within this mandate as discharges into those waterbodies may seriously affect water quality, navigation, and other Federal interests; however, it is also recognized that the Federal government would have the right to regulate the waters of the United States identified in paragraph (a)(5) under this broad Congressional mandate to fulfill the objective of the Act: "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters" (Section 101(a)). Paragraph (a)(5) incorporates all other waters of the United States that could be regulated under the Federal government's Constitutional powers to regulate and protect interstate commerce, including those for which the connection to interstate commerce may not be readily obvious or where the location or size of the waterbody generally may not require regulation through individual or general permits to achieve the objective of the Act. Discharges of dredged or fill material into waters of the United States identified in paragraphs (a)(1)–(4) will generally require individual or general permits unless those discharges occur beyond the headwaters of a river or stream or in natural lakes less than 10 acres in surface area. Discharges into these latter waters and into most of the waters identified in paragraph (a)(5) will be permitted by this regulation, subject to the provisions listed in paragraph 323.4–2(b) unless the District Engineer develops information, on a case-by-case basis, that the concerns for the aquatic environment as expressed in the EPA Guidelines (40 CFR 230) require regulation through an individual or general permit. (See 323.4–4).

by strong winds such as those accompanying a hurricane or other intense storm.

(i) The term "headwaters" means the point on a non-tidal stream above which the average annual flow is less than five cubic feet per second.[1] The District Engineer may estimate this point from available data by using the mean annual area precipitation, area drainage basin maps, and the average runoff coefficient, or by similar means.

(j) The term "primary tributaries" means the main stems of tributaries directly connecting to navigable waters of the United States up to their headwaters, and does not include any additional tributaries extending off of the main stems of these tributaries.

(k) The term "dredged material" means material that is excavated or dredged from waters of the United States.

(l) The term "discharge of dredged material" means any addition of dredged material into the waters of the United States. The term includes, without limitation, the addition of dredged material to a specified disposal site located in waters of the United States and the runoff or overflow from a contained land or water disposal area. Discharges of pollutants into waters of the United States resulting from the onshore subsequent processing of dredged material that is extracted for any commercial use (other than fill) are not included within this term and are subject to Section 402 of the Federal Water Pollution Control Act even though the extraction and deposit of such material may require a permit from the Corps of Engineers. The term does not include plowing, cultivating, seeding and harvesting for the production of food, fiber, and forest products.

(m) The term "fill material" means any material used for the primary purpose of replacing an aquatic area with dry land or of changing the bottom elevation of a waterbody. The term does not include any pollutant discharged into the water primarily to dispose of waste, as that activity is regulated under Section 402 of the Federal Water Pollution Control Act Amendments of 1972.

(n) The term "discharge of fill material" means the addition of fill material into waters of the United States. The term generally includes, without limitation, the following activities: Placement of fill that is necessary to the construction of any structure in a water of the United States; the building of any structure or impoundment requiring rock, sand, dirt, or other material for its construction; site-development fills for recreational, industrial, commercial, residential, and other uses; causeways or road fills; dams and dikes; artificial islands; property protection and/or reclamation devices such as riprap, groins, seawalls, breakwaters, and revetments; beach nourishment; levees; fill for structures such as sewage treatment facilities, intake and outfall pipes associated with power plants and subaqueous utility lines; and artificial reefs. The term does not include plowing, cultivating, seeding and harvesting for the production of food, fiber, and forest products.

(o) The term "individual permit" means a Department of the Army authorization that is issued following a case-by-case evaluation of a specific project involving the proposed discharge(s) in accordance with the procedures of this regulation and 33 CFR 325 and a determination that the proposed discharge is in the public interest pursuant to 33 CFR Part 320.

(p) The term "general permit" means a Department of the Army authorization that is issued for a category or categories of discharges of dredged or fill material that are substantially similar in nature and that cause only minimal individual and cumulative adverse environmental impact. A general permit is issued following an evaluation of the proposed category of discharges in accordance with the procedures of this regulation (§ 323.3(c)), 33 CFR Part 325, and a determination that the proposed discharges will be in the public interest pursuant to 33 CFR Part 320.

(q) The term "nationwide permit" means a Department of the Army authorization that has been issued by this regulation in § 323.4 to permit certain discharges of dredged or fill material into waters of the United States throughout the Nation.

§ 323.3 Discharges requiring permits.

(a) *General.* Department of the Army permits will be required for the discharge of dredged or fill material into waters of the United States. Certain discharges specified in §§ 323.4–1, 323.4–2 and 323.4–3 are permitted by this regulation. If a discharge of dredged or fill material is not permitted by this regulation, an individual or general Section 404 permit will be required for the discharge of dredged or fill material into waters of the United States in accordance with the following phased schedule:

(1) Before July 25, 1975, discharges into navigable waters of the United States.

(2) After July 25, 1975, discharges into navigable waters of the United States and adjacent wetlands.

(3) After September 1, 1976, discharges into navigable waters of the United States and their primary tributaries, including adjacent wetlands, and into natural lakes, greater than 5 acres in surface area. (See also § 323.4–2 for discharges that are permitted by this regulation.)

(4) After July 1, 1977, discharges into all waters of the United States. (See also § 323.4–2 for discharges that are permitted by this regulation.)

(b) *Individual permits.* Unless permitted by this regulation (§§ 323.4–1, 323.4–2 and 323.4–3) or authorized by general permits (§ 323.3(c)), the discharge of dredged or fill material into waters of the United States will require an individual Department of the Army permit issued in accordance with the policies in § 320.4 and procedures in 33 CFR Part 325.

(c) *General permits.* The District Engineer may, after compliance with the other procedures of 33 CFR Part 325, issue general permits for certain clearly described categories of structures or work, including discharges of dredged or fill material, requiring Department of the Army permits. After a general permit has been issued, individual activities falling within those categories will not require individual permit processing by the procedures of 33 CFR Part 325 unless the District Engineer determines, on a case-by-case basis, that the public interest requires individual review.

(1) District Engineers will include only those activities that are substantially similar in nature, that cause only minimal adverse environmental impact when performed separately, and that will have only a minimal adverse cumulative effect on the environment as categories which are candidates for general permits.

(2) The District Engineer shall include appropriate conditions as specified in Appendix C of 33 CFR Part 325 in each general permit and shall prescribe the following additional conditions:

(i) The maximum quantity of material that may be discharged and the maximum area that may be modified by a single or incidental operation (if applicable);

(ii) A description of the category or categories of activities included in the general permit; and

(iii) The type of water(s) into which the activity may occur.

(3) The District Engineer may require reporting procedures.

(4) A general permit may be revoked if it is determined that the effects of the activities authorized by it will have an adverse impact on the public interest provided the procedures of 33 CFR 325.7 are followed. Following revocation, applications for future activities in areas covered by the general permit shall be processed as applications for individual permits.

(d) *Activities of Federal agencies.* (1) Discharges of dredged or fill material into waters of the United States done by or on behalf of any Federal agency, or instrumentality other than the Corps of Engineers, are subject to the authorization procedures of this regulation. Agreement for construction or engineering services performed for other agencies by the Corps of Engineers does not constitute authorization under the regulation. Division and District Engineers will therefore advice Federal agencies and instrumentalities accordingly and cooperate to the fullest extent in the expeditious processing of their applications.

(2) The policy provisions set out in 33 CFR 320.4(j), relating to State or local authorizations, do not apply to discharges of dredged or fill material into

[1] For streams that are dry during long periods of the year, District Engineers, after notifying the Regional Administrator of EPA, may establish the headwater point as that point on the stream where a flow of five cubic feet per second is equaled or exceeded 50 percent of the time. The District Engineer shall notify the Regional Administrator of his determination of these headwater points.

waters of the United States undertaken by Federal agencies, except where compliance with non-Federal authorization is required by Federal law or Executive policy. Federal agencies are required to comply with the appropriate State, interstate and local water-quality standards and effluent limitations as are applicable by law that are adopted in accordance with or effective under the provisions of the Federal Water Pollution Control Act, as amended, in the design, construction, management, operation, and maintenance of their respective facilities. (See Executive Order No. 11752, dated 17 Dec. 73). They are not required, however, to provide certification of compliance with effluent limitations and water-quality standards from State or interstate water pollution control agencies in connection with activities involving discharges into waters of the United States.

(e) *Activities licensed under the Federal Power Act of 1920.* Any part of a structure or work licensed by the Federal Power Commission that involves the discharge of dredged or fill material into waters of the United States shall require a Department of the Army authorization under this regulation.

§ 323.4 Discharges permitted by this regulation.

(a) *General.* Discharges of dredged or fill material specified in §§ 323.4–1, 323.4–2 and 323.4–3, below, are hereby permitted for purposes of Section 404 without further processing under this regulation (individual applications are not needed), except as provided in § 323.4–4 below. Permits may, however, be required under Section 10 of the River and Harbor Act of 1899 (see 33 CFR 322). Sections 323.4–1, 323.4–2, and 323.4–3 do not obviate the requirement to obtain State or local assent required by law for the activities permitted therein.

(b) *Management practices.* In addition to the conditions specified in §§ 323.4–2(b) and 323.4–3(b), the following management practices should be followed, to the maximum extent practicable, in the discharge of dredged or fill material permitted by §§ 323.4–2 and 324.4–3 to minimize the adverse effects of these discharges on the aquatic environment:

(1) Discharges of dredged or fill material into waters of the United States should be avoided or minimized through the use of other practical alternatives;

(2) Discharges in spawning areas during spawning seasons should be avoided;

(3) Discharges should not restrict or impede the movement of aquatic species indigenous to the waters or the passage of normal or expected high flows or cause the relocation of the waters (unless the primary purpose of the fill is to impound waters);

(4) If the discharge creates an impoundment water, adverse impacts on the aquatic system caused by the accelerated passage of water and/or the restriction of its flow, should by minimized;

(5) Discharges in wetlands areas should be avoided;

(6) Heavy equipment working in wetlands should be placed on mats;

(7) Discharges into breeding and nesting areas for migratory waterfowl should be avoided; and

(8) All temporary fills should be removed in their entirety.

§ 323.4–1 Discharges prior to effective dates of phasing.

(a) Discharges of dredged or fill material in waters of the United States that occur before the phase-in dates specified in § 323.3(a)(2)–(4) above are hereby permitted for purposes of Section 404, provided the conditions in paragraph (c) below are met.

(b) Discharges of dredged or fill material of less than 500 cubic yards into waters other than navigable waters of the United States (see 33 CFR 329) that are part of an activity that was commenced before July 25, 1975, that were completed by January 25, 1976, and that involve a single and complete project and not a number of projects associated with a complete development plan are hereby permitted for purposes of Section 404, provided the conditions in paragraph (c) below are met. The term "commenced" as used herein shall be satisfied if there has been, before July 25, 1975, some discharge of dredged or fill material as a part of the above activity or an entering into of a written contractual obligation to have the dredged or fill material discharged at a designated disposal site by a contractor.

(c) For the purposes of Section 404, the following conditions must have been satisfied for the discharges occurring before the dates specified in paragraph (a) and (b) above:

(1) That the discharge was not located in the proximity of a public water intake;

(2) That the discharge did not contain unacceptable levels of pathogenic organisms in areas used for recreation involving physical contact with the water;

(3) That the discharge did not occur in areas of concentrated shellfish production; and

(4) That the discharge did not destroy or endanger the critical habitat or a threatened or endangered species, as identified under the Endangered Species Act.

§ 323.4–2 Discharges into certain waters of the United States.

(a) Discharges of dredged or fill material into the following waters of the United States are hereby permitted for purposes of Section 404, provided the conditions in paragraph (b) below are met:

(1) Non-tidal rivers, streams and their impoundments including adjacent wetlands that are located above the headwaters;

(2) Natural lakes, including their adjacent wetlands, that are less than 10 acres in surface area and that are fed or drained by a river or stream above the headwaters. In the absence of adjacent wetlands, the surface area of a lake shall be determined at the ordinary high water mark;

(3) Natural lakes, including their adjacent wetlands, that are less than 10 acres in surface area and that are isolated and not a part of a surface river or stream. In the absence of adjacent wetlands, the surface area of a lake shall be determined at the ordinary high water mark; and

(4) Other non-tidal waters of the United States other than isolated lakes larger than 10 acres (see (3) above) that are not part of a surface tributary system to interstate waters or navigable waters of the United States (see § 323.2 (a)(5)).

(b) For purposes of Section 404, the following conditions must be satisfied for any discharge of dredged or fill material in waters described in paragraph (a), above:

(1) That the discharge will not destroy a threatened or endangered species as identified under the Endangered Species Act, or endanger the critical habitat of such species;

(2) That the discharge will consist of suitable material free from toxic pollutants in other than trace quantities;

(3) That the fill created by the discharge will be properly maintained to prevent erosion and other non-point sources of pollution; and

(4) That the discharge will not occur in a component of the National Wild and Scenic Rivers System or in a component of a State wild and scenic river system.

§ 323.4–3 Specific categories of discharges.

(a) The following discharges of dredged or fill material into waters of the United States are hereby permitted for purposes of Section 404, provided the conditions specified in this paragraph and paragraph (b) below are met:

(1) Dredged or fill material placed as backfill or bedding for utility line crossings provided there is no change in preconstruction bottom contours (excess material must be removed to an upland disposal area). A "utility line" is defined as any pipe or pipeline for the transportation of any gaseous, liquid, liquifiable, or slurry substance, for any purpose, and any cable, line, or wire for the transmission for any purpose of electrical energy, telephone and telegraph messages, and radio and television communication. (The utility line will require a Section 10 permit if in navigable waters of the United States. See 33 CFR Part 322.);

(2) Material discharged for bank stabilization, provided that the bank stabilization activity is less than 500 feet in length, is necessary for erosion prevention, and is limited to less than an average of one cubic yard per running foot along the bank, provided further that no material for bank stabilization is placed in any wetland area, and provided further that no material is placed in any locality or in any manner so as to impair surface water flow into or out of any wetland area. (This activity will require a Section 10 permit if in navigable waters of the United States. See 33 CFR part 322.);

(3) Minor road crossing fills including all attendant features both temporary and permanent that are part of a single and complete crossing of a nontidal waterbody, provided that the crossing is culverted or bridged to prevent the restriction of expected high flows and, provided further that discharges into any wetlands adjacent to the waterbody do not extend beyond 100 feet on either side of the ordinary high water mark of that waterbody. A "minor road crossing fill" is defined as a crossing that involves the discharge of less than 200 cubic yards of fill material below the plane of ordinary high water. The crossing will require a permit from the US Coast Guard if located in navigable waters of the United States (see 33 USC 401);

(4) Fill placed incidental to the construction of bridges across tidal waters including cofferdams, abutments, foundation seals, piers, and temporary construction and access fills. Approach fills and causeways are not included in this permit and will require an individual or general Section 404 permit if located in waters of the United States; these fills as well as the bridge itself will also require a permit from the U.S. Coast Guard; and

(5) The repair, rehabilitation or replacement of any previously authorized, currently serviceable fill, or of any currently serviceable fill discharged prior to the requirement for authorization; provided such repair, rehabilitation or replacement does not result in a deviation from the specifications of the original work, and further provided that the fill to be maintained has not been put to uses differing from uses specified for it in any permit authorizing its original construction.

(b) For the purposes of Section 404, the following conditions must be satisfied prior to any discharge of dredged or fill material associated with the activities described above:

(1) That the discharge will not be located in the proximity of a public water supply intake;

(2) That the discharge will not occur in areas of concentrated shellfish production;

(3) That the discharge will not destroy a threatened or endangered species as identified under the Endangered Species Act, or endanger the critical habitat of such species;

(4) That the discharge will not disrupt the movement of those species of aquatic life indigenous to the waterbody;

(5) That the discharge will consist of suitable material free from toxic pollutants in other than trace quantities;

(6) That the fill created by the discharge will be properly maintained to prevent erosion and other non-point sources of pollution; and

(7) That the discharge will not occur in a component of the National Wild and Scenic River System or in a component of a State wild and scenic river system.

§ 323.4–4 Discretionary authority to require individual or general permits.

Notwithstanding the provisions of §§ 323.4–1, 323.4–2 and 323.4–3, above, the procedures of this regulation and 33 CFR Part 325, including those pertaining to individual and general permits, shall apply to any discharge(s) of dredged or fill material if the District Engineer determines that the concerns of the aquatic environment, as expressed in the guidelines (see 40 CFR Part 230) indicate the need for such action because of individual and/or cumulative adverse impacts to the affected waters. In such cases, he shall take such steps as are necessary to notify persons who would be affected by such action. If the Regional Administrator, EPA, advises the District Engineer that the concerns for the aquatic environment as expressed in the Section 404(b) Guidelines require assertion of jurisdiction under § 323.4–4, and the District Engineer and Division Engineer disagree, the Office of the Chief of Engineers (DAEN–CWO–N and DAEN–CCH) shall be notified for further coordination and resolution with the Administrator.

§ 323.5 Special policies and procedures.

The Secretary of the Army has delegated to the Chief of Engineers the authority to issue or deny Section 404 permits. (See Appendix A.) The following additional special procedures shall also be applicable to the evaluation of permit applications under this regulation:

(a) *EPA Guidelines.* Applications for permits for the discharge of dredged or fill material into waters of the United States will be reviewed in accordance with guidelines promulgated by the Administrator, EPA, under authority of Section 404(b) of the Federal Water Pollution Control Act. (See 40 CFR Part 230.) If the EPA guidelines alone prohibit the designation of a proposed disposal site, the economic impact on navigation and anchorage of the failure to authorize the use of the proposed disposal site will also be considered in evaluating whether or not the proposed discharge is in the public interest.

(b) *Coordination with EPA.* Prior to actual issuance of permits for the discharge of dredged or fill material in waters of the United States, Corps of Engineers officials will advise appropriate Regional Administrators, EPA, of the intent to issue permits to which EPA has objected, recommended conditions, or for which significant changes are proposed. If the Regional Administrator advises, within fifteen days of the advice of the intent to issue, that he objects to the issuance of the permits, the case will be forwarded to the Chief of Engineers in accordance with 33 CFR 325.11 for further coordination with the Administrator, EPA, and decision. The report forwarding the case will contain an analysis of the economic impact on navigation and anchorage that would occur by failing to authorize the use of a proposed disposal site, and whether there are other economically feasible methods or sites available other than those to which the Regional Administrator objects.

APPENDIX A.—DELETION OF AUTHORITY TO ISSUE OR DENY PERMITS FOR THE DISCHARGE OF DREDGED OR FILL MATERIAL INTO NAVIGABLE WATERS

MARCH 12, 1973.

Pursuant to the authority vested in me by Section 404 of the Federal Water Pollution Control Act Amendments of 1972, 86 Stat. 816, P.L. 92–500, I hereby authorize the Chief of Engineers and his authorized representatives to issue or deny permits, after notice and opportunity for public hearings, for the discharge of dredged or filled material into navigable waters at specified disposal sites. The Chief of Engineers shall, in exercising such authority, evaluate the impact of the proposed discharge on the public interest. All permits issued shall specify a disposal site for the discharge of the dredged or fill material through the application of guidelines developed by the Administrator of the Environmental Protection Agency and myself. In those cases where these guidelines would prohibit the specification of a disposal site, the Chief of Engineers, in his evaluation of whether the proposed discharge is in the public interest, is authorized also to consider the economic impact on navigation and anchorage which would occur by failing to authorize the use of a proposed disposal site. The permits so granted may be made subject to such special conditions as the Chief of Engineers or his authorized representatives may consider necessary in order to effect the purposes of the above Act, other pertinent laws and any applicable memoranda of understanding between the Secretary of the Army and heads of other governmental agencies.

The Chief of Engineers and his authorized representative shall exercise the authority hereby delegated subject to such conditions as I or my authorized representative may from time to time impose.

KENNETH E. BELIEU,
Acting Secretary of the Army.

PART 324—PERMITS FOR OCEAN DUMPING OF DREDGED MATERIAL

Sec.
324.1 General.
324.2 Definitions.
324.3 Activities requiring permits.
324.4 Special procedures.
Appendix A.—Delegation of authority.

AUTHORITY: 33 U.S.C. 1413.

§ 324.1 General.

This regulation prescribes in addition to the general policies of 33 CFR 320.4 and procedures of 33 CFR Part 325, those special policies, practices and procedures to be followed by the Corps of Engineers in connection with the review of applications for Department of the Army permits to authorize the transportation of dredged material by vessel for the purpose of dumping it in ocean waters at dumping sites designated under 40 CFR Part 228 pursuant to Section 103 of the Marine Protection, Research and Sanctuaries Act of 1972, as amended (33 USC 1413) (hereinafter referred to as Section 103). See 33 CFR 320.2(h). Activities involving the transportation of dredged material for the purpose of dumping in the ocean waters also require Department of the Army permits under Section

10 of the River and Harbor Act of 1899 (33 USC 403) for the dredging in navigable waters of the United States. Applicants for Department of the Army permits under this Part should also refer to 33 CFR Part 322 to satisfy the requirements of Section 10.

§ 324.2 Definitions.

For the purpose of this regulation, the following terms are defined:

(a) The term "ocean waters" means those waters of the open seas lying seaward of the base line from which the territorial sea is measured, as provided for in the Convention on the Territorial Sea and the Contiguous Zone (15 UST 1606; TIAS 5639).

(b) The term "dredged material" means any material excavated or dredged from navigable waters of the United States or ocean waters.

(c) The term "transport" or "transportation" refers to the carriage and related handling of dredged material by a vessel.

§ 324.3 Activities requiring permits.

(a) *General.* Department of the Army permits are required for the transportation of dredged material for the purpose of dumping it in ocean waters.

(b) *Activities of Federal agencies.* (1) The transportation of dredged material for the purpose of dumping in ocean waters done by or on behalf of any Federal agency other than the activities of the Corps of Engineers are subject to the procedures of this regulation. Agreement for construction or engineering services performed for other agencies by the Corps of Engineers does not constitute authorization under the regulation. Division and District Engineers will therefore advise Federal agencies accordingly and cooperate to the fullest extent in the expeditious processing of their applications. The activities of the Corps of Engineers that involve the transportation of dredged material for dumping in ocean waters are regulated by 33 CFR 209.145.

(2) The policy provisions set out in 33 CFR 320.4(j) relating to State or local authorizations do not apply to work or structures undertaken by Federal agencies, except where compliance with non-Federal authorization is required by Federal law or Executive policy. Federal agencies are required to comply with the substantive State, interstate, and local water-quality standards and effluent limitations as are applicable by law that are adopted in accordance with or effective under the provisions of the Marine Protection, Research and Sanctuaries Act of 1972, as amended, and related laws in the design, construction, management, operation, and maintenance of their respective facilities. (See Executive Order No. 11752, dated 17 Dec 73.) They are not required, however, to obtain and provide certification of compliance with effluent limitations and water-quantity standards from State or interstate water pollution control agencies in connection with activities involving discharges into ocean waters.

§ 324.4 Special procedures.

The Secretary of the Army has delegated to the Chief of Engineers the authority to issue or deny Section 103 permits. (See Appendix A.) The following additional procedures shall also be applicable under this regulation.

(a) *Public notice.* For all applications for Section 103 permits, the District Engineer will issue a public notice which shall contain, in addition to the information specified in 33 CFR 325.3, the following information:

(1) The location of the proposed disposal site and its physical boundaries;

(2) A statement as to whether the site has been designated for use by the Administrator, EPA, pursuant to Section 102(c) of the Act;

(3) If the proposed disposal site has not been designated by the Administrator, EPA a description of the characteristics of the proposed disposal site and an explanation as to why no previously designated disposal site is feasible;

(4) A brief description of known dredged material discharges at the proposed disposal site;

(5) Existence and documented effects of other authorized dumpings that have been made in the dumping area (e.g., heavy metal background reading and organic carbon content);

(6) An estimate of the length of time during which disposal will continue at the proposed site;

(7) Characteristics and composition of the dredged material; and

(8) A statement concerning a preliminary determination of the need for and/or availability of an environmental impact statement.

(b) *Evaluation.* Applications for permits for the transportation of dredged material for the purpose of dumping it in ocean waters will be evaluated to determine whether the proposed dumping will unreasonably degrade or endanger human health, welfare, or amenities, or the marine environment, ecological systems or economic potentialities. In making this evaluation, criteria established by the Administrator, EPA, pursuant to Section 102 of the Marine Protection Research and Sanctuaries Act of 1972, as amended, shall be applied including an evaluation of the need for the ocean dumping and including the availability of alternatives to ocean dumping. Where ocean dumping is determined to be necessary, the District Engineer will, to the extent feasible, specify disposal sites using the recommendations of the Administrator pursuant to Section 102(c) of the Act. See 40 CFR Parts 220 to 229.

(c) *EPA review.* If the Regional Administrator, EPA, advises the District Engineer that the proposed dumping will comply with the criteria the District Engineer shall complete his evaluation of the Section 103 application under this regulation and 33 CFR Parts 320 and 325. If, however, the Regional Administrator advises the District Engineer that the proposed dumping will not comply with the Criteria, the District Engineer will proceed as follows.

(1) The District Engineer shall determine whether there is an economically feasible alternative method or site available other than the proposed ocean disposal site. If there are other feasible alternative methods or sites available, the District Engineer shall evaluate them in accordance with 33 CFR Parts 320, 322, 323, 325 and this regulation, as appropriate.

(2) If the District Engineer makes a determination that there is no economically feasible alternative method or site available, he shall so advise the Regional Administrator of his intent to issue the permit setting forth his reasons for such determination.

(d) *EPA objection.* If the Regional Administrator advises, within 15 days of the notice of the intent to issue, that he still objects to the issuance of the permit, the case will be forwarded to the Chief of Engineers, for further coordination with the Administrator, EPA, and decision. The report forwarding the case will contain, in addition to the analysis required by 33 CFR 325.11, an analysis of whether there are other economically feasible methods or sites available to dispose of the dredged material.

(e) *Chief of Engineers review.* The Chief of Engineers shall evaluate the permit application and make a decision to deny the permit or recommend its issuance. If the decision of the Chief of Engineers is that ocean dumping at the proposed disposal site is required because of the unavailability of economically feasible alternatives, he shall so certify and request that the Secretary of the Army seek a waiver from the Administrator, EPA, of the Criteria or of the critical site designation in accordance with 40 CFR 225.4.

APPENDIX A—DELEGATION OF AUTHORITY TO ISSUE OR DENY PERMITS FOR THE TRANSPORTATION OF DREDGED MATERIAL FOR THE PURPOSE OF DUMPING IT INTO OCEAN WATERS

MARCH 12, 1973.

Pursuant to the authority vested in me by Section 103 of the Marine Protection, Research, and Sanctuaries Act of 1972, 86 Stat. 1052, Pub. L. 92-532, I hereby authorize the Chief of Engineers and his authorized representatives to issue or deny permits, after notice and opportunity for public hearings, for the transportation of dredged material for the purpose of dumping it in ocean waters. The Chief of Engineers and his authorized representatives shall, in exercising such authority, evaluate the impact of the proposed dumping on the public interest. No permit shall be issued unless a determination is made that the proposed dumping will not unreasonably degrade or endanger human health, welfare, or amenities, or the marine environment, ecological systems, or economic potentialities. In making this determination, those criteria for ocean dumping established by the Administrator of the Environmental Protection Agency pursuant to Section 102 (a) of the above Act which relate to the effects of the proposed dumping shall be applied. In addition, based upon an evaluation of the potential effect which a permit denial will have on navigation, economic and industrial development, and foreign and domestic commerce of the United States, the Chief of Engineers or his authorized representatives, in evaluating the permit appli-

cation, shall make an independent determination as to the need for the dumping, other possible methods of disposal, and appropriate locations for the dumping. In considering appropriate disposal sites, recommended sites designated by the Administrator of the Environmental Protection Agency pursuant to Section 102(c) of the above Act will be utilized to the extent feasible. Prior to issuing any permit, the Chief of Engineers or his authorized representatives shall first notify the Administrator of the Environmental Protection Agency or his authorized representative of his intention to do so. In any case in which the Administrator or his authorized representative disagrees with the determination of the Chief of Engineers or his authorized representative as to compliance with the criteria established pursuant to Section 102(a) of the above Act relating to the effects of the dumping or with the restrictions established pursuant to Section 102(c) of the above Act relating to critical areas, the determination of the Administrator or his authorized representative shall prevail. If, in any such case the Chief of Engineers or his Director of Civil Works finds that, in the disposition of dredged material, there is no economically feasible method or site available other than a dumping site the utilization of which would result in noncompliance with such criteria or restrictions, he shall so certify and request that I seek a waiver from the Administrator of the Environmental Protection Agency of the specific requirements involved. Unless the Administrator of the Environmental Protection Agency grants a waiver, the Chief of Engineers or his authorized representatives shall not issue a permit which does not comply with such criteria and restrictions. The permits so granted may be made subject to such special conditions as the Chief of Engineers or his authorized representatives may consider necessary in order to effect the purposes of the above Act, other pertinent laws, and any applicable memoranda of understanding between the Secretary of the Army and the heads of other governmental agencies.

The Chief of Engineers and his authorized representative shall exercise the authority hereby delegated subject to such conditions as I or my authorized representative may from time to time impose.

KENNETH E. BELIEU,
Acting Secrtary of the Army.

PART 325—PROCESSING OF DEPARTMENT OF THE ARMY PERMITS

Sec.

AUTHORITY: 33 U.S.C. 401 et seq.; 33 U.S.C. 1344; 33 U.S.C. 1413.

§ 325.1 Applications for permits.

(a) *General.* The processing procedures of this regulation (Part 325) apply to any form of Department of the Army permit. Special procedures and additional information are contained in Parts 320 through 324. This Part is arranged in the basic timing sequence used by the Corps of Engineers in processing Department of the Army permits.

(b) *Application form.* Any person proposing to undertake any activity requiring Department of the Army authorization as specified in 33 CFR 321–324 must apply for a permit to the District Engineer in charge of the District where the proposed activity is to be performed. Applications for permits must be prepared in accordance with instructions in Engineer Pamphlet 1145–2–1, "A Guide for Applicants," utilizing the prescribed application form (ENG Form 4345). The form and pamphlet may be obtained from the District Engineer having jurisdiction over the waterway in which the proposed activity will be located. Local variations of the application form for purposes of facilitating coordination with State and local agencies may be used.

(c) *Content of application.* (1) Generally, the application must include a complete description of the proposed activity including necessary drawings, sketches or plans; the location, purpose and intended use of the proposed activity; scheduling of the activity; the names and addresses of adjoining property owners; the location and dimensions of adjacent structures; and the approvals required by other Federal, interstate, State or local agencies for the work, including all approvals received or denials already made.

(2) If the activity involves dredging in waters of the United States, the application must include a description of the type, composition and quantity of the material to be dredged, the method of dredging, and the site and plans for disposal of the dredged material.

(3) If the activity includes the discharge of dredged or fill material in the waters of the United States or the transportation of dredged material for the purpose of dumping it in ocean waters, the application must include the source of the material; a description of the type, composition and quantity of the material; the method of transportation and disposal of the material; and the location of the disposal site. (See Part 324 for additional information requirements on ocean dumping applications.) Certification under Section 401 of the Federal Water Pollution Control Act is required for such discharges into waters of the United States.

(4) If the activity includes the construction of a fill or pile or float-supported platform, the project description must include the use and specific structures to be erected on the fill or platform.

(d) *Additional information.* In addition to the information indicated in subparagraph (c), above, the applicant will be required to furnish such additional information as the District Engineer may deem necessary to assist him in his evaluation of the application. Such additional information may include environmental data and information on alternate methods and sites, as may be necessary for the preparation of the Environmental Assessment or Environmental Impact Statement (see § 325.4).

(e) *Signature of application.* The application must be signed by the person who desires to undertake the proposed activity; however, the application may be signed by a duly authorized agent if accompanied by a statement by that person designating the agent and agreeing to furnish, upon request, supplemental information in support of the application. In either case, the signature of the applicant will be understood to be an affirmation that he possesses the authority to undertake the activity proposed in his application, except where the lands are under the control of the Corps of Engineers, in which cases the District Engineer will coordinate the transfer of the real estate and the permit action. When the application is submitted by an agent, the application may include the activity of more than one owner provided the character of the activity of each owner is similar and in the same general area.

(f) *Fees.* Fees are required for permit applications under Section 404 of the Federal Water Pollution Control Act Amendments of 1972, Section 103 of the Marine Protection, Research and Sanctuaries Act of 1972, as amended, and Sections 9 and 10 of the River and Harbor Act of 1899. A fee of $100.00 will be charged when the planned or ultimate purpose of the project is commercial or industrial in nature and is in support of operations that charge for the production, distribution or sale of goods or services. A $10.00 fee will be charged for permit applications when the work is non-commercial in nature and provides personal benefits that have no connection with a commercial enterprise. The final decision as to basis for fee (commercial vs. non-commercial) shall be solely the responsibility of the District Engineer. No fee will be charged if the applicant withdraws his application at any time prior to issuance of the permit and/or if his application is denied. Collection of the fee will be deferred until the applicant is notified by the District Engineer that a public interest review has been completed and that the proposed activity has been determined to be in the public interest. Upon receipt of this notification the applicant will forward a check or money order to the District Engineer, made payable to the Treasurer of the United States. The permit will then be issued upon receipt of the application fee. Multiple fees are not to be charged if more than one law is applicable. Any modification significant enough to require a permit will also require a fee. No fee will be assessed when a permit is transferred from one property owner to another. No fees will be charged for time extensions or general permits. Agencies or instrumentalities of Federal, State or local governments will not be required to pay any fee in connection with the applications for permits. This fee structure will be reviewed from time to time.

§ 325.2 Processing of applications.

(a) *Standard procedures.* (1) When an application for a permit is received, the District Engineer shall immediately assign it a number for identification, acknowledge receipt thereof, and advise the applicant of the number assigned to it. He shall review the application for completeness, and obtain from the applicant any additional information he deems necessary for further processing.

(2) When all required information has been provided, the District Engineer will issue a public notice as described in § 325.3, below, unless specifically exempted by other provisions of this regulation.

(3) The District Engineer shall consider all comments received in response to the public notice (see § 325.3) in his subsequent actions on the permit application. Receipt of the comments will be acknowledged and they will be made a part of the official file on the application. Comments received as form letters or petitions may be acknowledged as a group to the person or organization responsible for the form letter or petition. If comments relate to matters within the special expertise of another Federal agency, the District Engineer may seek the advice of that agency. The applicant must be given the opportunity to furnish the District Engineer his proposed resolution or rebuttal to all objections from Government agencies and other substantive adverse comments before final decision will be made on the application.

(4) The District Engineer shall prepare an Environmental Assessment on all applications. The Environmental Assessment shall be dated, signed, and placed in the record and shall include the expected environmental impacts of the proposal. Where the District Engineer has delegated authority to sign permits for and in his behalf, he may similarly delegate the signing of the Environmental Assessment. In those cases requiring an Environmental Impact Statement (EIS), the draft EIS may serve as the Environmental Assessment. Where an EIS is not prepared, the Environmental Assessment will include a statement that the decision on the application is not a major Federal action significantly affecting the quality of the human environment.

(5) The District Engineer shall also evaluate the proposed application to determine the need for a public hearing pursuant to 33 CFR Part 327.

(6) After all above actions have been completed, the District Engineer will determine in accordance with the record and applicable regulations whether or not the permit should be issued. He shall prepare a Findings of Fact on all applications to support his determination. The Findings of Fact shall include the District Engineer's views on the probable effect of the proposed work on the public interest including conformity with the guidelines published for the discharge of dredged or fill material in waters of the United States (40 CFR Part 230) or with the criteria for dumping of dredged material in ocean waters (40 CFR Parts 220 to 229), if applicable, and the conclusions of the District Engineer. The Findings of Fact shall be dated, signed, and included in the record prior to final action on the application. Where the District Engineer has delegated authority to sign permits for and in his behalf, he may similarly delegate the signing of the Findings of Fact. If a permit is warranted, the District Engineer will determine the conditions and duration which should be incorporated into the permit. In accordance with the authorities specified in § 325.8, the District Engineer will take final action or forward the application with all pertinent comments, records, and studies, including the final Environmental Impact Statement, if prepared, through channels to the official authorized to make the final decision. The report forwarding the application for decision will be in the format prescribed in § 325.11. Notice that the application has been forwarded to higher headquarters will be furnished the applicant and to any Federal agency expressing an interest in the application. Such notice shall not divulge the District Engineer's recommendations. In those cases where the application is forwarded for decision in the format prescribed in § 325.11, the report will serve as the Findings of Fact.

(7) If the final decision is to deny the permit, the applicant will be advised in writing of the reason for denial. If the final decision is to issue the permit, the issuing official will forward two copies of the draft permit to the applicant for signature accepting the conditions of the permit. The applicant will return both signed copies to the issuing official who then signs and dates the permit. The permit is not valid until signed by the issuing official. Final action on the permit application is the signature on the letter notifying the applicant of the denial of his application or signature of the issuing official on the authorizing document.

(8) The District Engineer will publish monthly a list of permits issued or denied during the previous month. The list will identify each action by public notice number, name of applicant, and brief description of activity involved. This list will be distributed to all persons who received any of the public notices listed.

(9) If the applicant fails to respond within 45 days to any request or inquiry of the District Engineer, the District Engineer may advise the applicant by certified letter that his application will be considered as having been withdrawn unless the applicant responds thereto within thirty days of the date of the letter.

(b) *Procedures for particular types of permit situations.* (1) If the District Engineer determines that water quality certification for the proposed activity is necessary under the provisions of the Federal Water Pollution Control Act, he shall so notify the applicant and obtain from him either the appropriate certification or a copy of his application for such certification. The District Engineer may issue the public notice of the application jointly with the certifying agency if arrangements for such joint notices have been approved by the Division Engineer. When the activity may affect the waters of another State, a copy of the certification will be forwarded to the Regional Administrator of EPA who shall determine if the proposed activity may affect the quality of the waters of any State or States other than the State in which the work is to be performed. If he needs supplemental information in order to make this determination, the Regional Administrator may request it from the District Engineer who shall obtain it from the applicant and forward it to the Regional Administrator. The Regional Administrator shall, within thirty days of receipt of the application, certification and supplemental information, notify the affected State, the District Engineer, and the applicant in the event such a second State may be affected. The second State then has sixty days to advise the District Engineer that it objects to the issuance of the permit on the basis of the effect on the quality of its waters and to request a hearing. No authorization will be granted until required certification has been obtained or has been waived. Waiver is deemed to occur if the certifying agency fails or refuses to act on a request for certification within a reasonable period of time after receipt of such request. The request for certification must be made in accordance with the regulations of the certifying agency. In determining whether or not a waiver period has commenced, the District Engineer will verify that the certifying agency has received a valid request for certification. Three months shall generally be considered to be a reasonable period of time. If, however, special circumstances identified by the District Engineer require that action on an application be taken within a more limited period of time, the District Engineer shall determine a reasonable lesser period of time, advise the certifying agency of the need for action by a particular date and that, if certification is not received by that date, it will be considered that the requirement for certification has been waived. Similarly if it appears that circumstances may reasonably require a period of time longer than three months, the District Engineer may afford the certifying agency up to one year to provide the required certification before determining that a waiver has occurred. District Engineers shall check with the certifying agency at the end of the allotted period of time before determining that a waiver has occurred.

(2) If the proposed activity is to be undertaken in a State operating under a coastal zone management program approved by the Secretary of Commerce pursuant to the Coastal Zone Management Act (see 33 CFR 320.3(b)), the District Engineer shall proceed as follows:

(i) If the applicant is a Federal agency, and the application involves a Federal activity in or affecting the coastal zone or a Federal development project in the coastal zone, the District Engineer shall forward a copy of the public notice to

the agency of the State responsible for reviewing the consistency of Federal activities. The Federal agency applicant shall be responsible for complying with the Coastal Zone Management Act's directives for ensuring that Federal agency activities are undertaken in a manner which is consistent, to the maximum extent practicable, with approved coastal zone management programs. (See 15 CFR Part 930.) If the State coastal zone agency objects to the proposed Federal activity on the basis of its inconsistency with the State's approved coastal zone management program, the District Engineer shall not make a final decision on the application until the disagreeing parties have had an opportunity to utilize the procedures specified by the Coastal Zone Management Act for resolving such disagreements.

(ii) If the applicant is not a Federal agency and the application involves an activity affecting the coastal zone, the District Engineer shall obtain from the applicant a certification that his proposed activity complies with and will be conducted in a manner that is consistent with the approved State coastal zone management program. Upon receipt of the certification, the District Engineer will forward a copy of the public notice (which will include the applicant's certification statement) to the State coastal zone agency and request its concurrence or objection. The District Engineer can issue the public notice of the application jointly with the State agency if arrangements for such joint notices have been approved by the Division Engineer. If the State agency objects to the certification or issues a decision indicating that the proposed activity requires further review, the District Engineer shall not issue the permit until the State concurs with the certification statement or the Secretary of Commerce determines that the proposed activity is consistent with the purposes of the Coastal Zone Management Act or is necessary in the interest of national security. If the State agency fails to concur or object to a certification statement within six months of the State agency's receipt of the certification statement, State agency concurrence with the certification statement shall be conclusively presumed.

(3) If the proposed activity involves any property listed or eligible for listing in the National Register of Historic Places (which is published in its entirety in the FEDERAL REGISTER annually in February with addenda published each month), the District Engineer will proceed in accordance with 33 CFR Part 305.

(4) If the proposed activity consists of the dredging of an access channel and/or berthing facility associated with an authorized Federal navigation project, the activity will be included in the planning and coordination of the construction or maintenance of the Federal project to the maximum extent feasible. Separate notice, hearing, and Environmental Impact Statement will not be required for activities so included and coordinated; and the public notice issued by the District Engineer for these Federal and associated non-Federal activities will be the notice of intent to issue permits for those included non-Federal dredging activities. The decision whether to issue or deny such a permit will be consistent with the decision on the Federal project unless special considerations applicable to the proposed activity are identified. (See § 322.5(a).)

(5) Copies of permits will be furnished to other agencies in appropriate cases as follows:

(i) If the activity involves the construction of structures or artificial islands on the outer continental shelf, to the Director, Defense Mapping Agency, Hydrographic Center, Washington, D.C. 20390: Attention, Code N512 and to the Director, National Ocean Survey, NOAA, Department of Commerce, Rockville, Maryland 20852.

(ii) If the activity involves the construction of structures to enhance fish propagation (fish havens) along the coasts of the United States, to Defense Mapping Agency, Hydrographic Center and National Ocean Survey as in (i), above, and to the Director, Office of Marine Recreational Fisheries, National Marine Fisheries Service, Washington, D.C. 20235.

(iii) If the activity involves the erection of an aerial transmission line across a navigable water of the United States, to the Director, National Ocean Survey, NOAA, Department of Commerce, Rockville, Maryland 20852, reference C322.

(iv) If the activity is listed in subparagraphs (i), (ii), or (iii), above, or involves the transportation of dredged material for the purpose of dumping it in ocean waters, to the appropriate District Commander, U.S. Coast Guard.

(c) *Emergency procedures.* An "emergency" is a situation which would result in an unacceptable hazard to life or severe loss of property if corrective action requiring a permit is not undertaken within a time period less than the normal time needed to process the application under required procedures. In such cases the District Engineer will explain the circumstance and recommend special procedures in writing to the Chief of Engineers, ATTN: DAEN-CWO-N. The Chief of Engineers, upon consultation with the Secretary of the Army or his authorized representative, will instruct the District Engineer as to further processing of the application.

(d) *Timing of processing of applications.* In view of the extensive coordination with other agencies and the public and the study of all aspects of proposed activities required by the above procedures, applicants must allow adequate time for the processing of their applications. The District Engineer will be guided by the following time limits for the indicated steps in processing permit applications:

(1) Public notice should be issued within fifteen days of receipt of all required information from the applicant, unless joint notice with State agencies is to be used.

(2) The receipt of comments as a result of the public notice should not extend beyond thirty days from the date of the notice. However, if unusual circumstances warrant, the District Engineer may extend the comment period up to a maximum of seventy-five days.

(3) The District Engineer should either send notice of denial to the applicant or issue the draft permit to the applicant for acceptance and signature, or forward the application to higher headquarters within thirty days of one of the following whichever is latest: Closing of the public notice comment period with no objections received; receipt of notice of withdrawal of objections; completion of coordination following receipt of applicant's rebuttal of objections; closing of the record of a public hearing; or expiration of the waiting period following the filing of the final Environmental Impact Statement with CEQ.

§ 325.3 Public notice.

(a) *General.* The Public notice is the primary method of advising all interested parties of the proposed activity for which a permit is sought and of soliciting comments and information necessary to evaluate the probable impact on the public interest. The notice must, therefore, include sufficient information to give a clear understanding of the nature of the activity to generate meaningful comments. The notice should include the following items of information:

(1) Applicable statutory authority or authorities;

(2) The name and address of the applicant;

(3) The location of the proposed activity;

(4) A brief description of the proposed activity, its purpose and intended use, including a description of the type of structures, if any, to be erected on fills, or pile or float-supported platforms, and a description of the type, composition and quantity of materials to be discharged or dumped and means of conveyance. See also 33 CFR 324 for additional information required on ocean dumping public notices;

(5) A plan and elevation drawing showing the general and specific site location and character of all proposed activities, including the size relationship of the proposed structures to the size of the impacted waterway and depth of water in the area;

(6) If the proposed activity would occur in the territorial seas or ocean waters, a description of the activity's relationship to the baseline from which the territorial sea is measured;

(7) A list of other government authorizations obtained or requested, including required certifications relative to water quality, coastal zone management, or marine sanctuaries;

(8) A statement concerning a preliminary determination of the need for and/or availability of an Environmental Impact Statement;

(9) Any other available information which may assist interested parties in evaluating the likely impact of the proposed activity, if any, on factors affecting the public interest, including environmental values; and

(10) A reasonable period of time, normally thirty days but not less than fifteen days from date of mailing, within which interested parties may express their views concerning the permit application.

(b) *Evaluation factors.* A paragraph describing the various factors on which decisions are based during evaluation of a permit application shall be included in every public notice.

(1) Except as provided in paragraph (b)(4) below, the following will be included:

The decision whether to issue a permit will be based on an evaluation of the probable impact of the proposed activity on the public interest. That decision will reflect the national concern for both protection and utilization of important resources. The benefit which reasonably may be expected to accrue from the proposal must be balanced against its reasonably foreseeable detriments. All factors which may be relevant to the proposal will be considered; among those are conservation, economics, aesthetics, general environmental concerns, historic values, fish and wildlife values, flood damage prevention, land use, navigation, recreation, water supply, water quality, energy needs, safety, food production and, in general, the needs and welfare of the people.

(2) If the activity involves the discharge of dredged or fill material into the waters of the United States or the transportation of dredged material for the purpose of dumping it in ocean waters, the public notice shall also indicate that the evaluation of the impact of the activity on the public interest will include application of the guidelines promulgated by the Administrator, EPA, under authority of Section 404(b) of the Federal Water Pollution Control Act (40 CFR Part 230) or of the criteria established under authority of Section 102(a) of the Marine Protection, Research and Sanctuaries Act of 1972, as amended (40 CFR Parts 220 to 228), as appropriate. See also 33 CFR Part 324.

(3) If the activity includes the discharge of dredged or fill material in the waters of the United States or the transportation of dredged material for the purpose of dumping it in ocean waters, the following statement will also be included in the public notice:

Any person may request, in writing, within the comment period specified in this notice, that a public hearing be held to consider this application. Requests for public hearings shall state, with particularity, the reasons for holding a public hearing.

(4) In cases involving construction of fixed structures or artificial islands on Outer Continental Shelf lands which are under mineral lease from the Department of the Interior, the notice will contain the following statement: "The decision as to whether a permit will be issued will be based on an evaluation of the impact of the proposed work on navigation and national security."

(c) *Distribution of public notices.* (1) Public notices will be distributed for posting in post offices or other appropriate public places in the vicinity of the site of the proposed work and will be sent to the applicant, to appropriate city and county officials, to adjoining property owners, to appropriate State agencies, to concerned Federal agencies, to local, regional and national shipping and other concerned business and conservation organizations, to appropriate River Basin Commissions, and to any other interested party. If in the judgment of the District Engineer the proposal may result in substantial public interest, the public notice (without drawings) may be published for five consecutive days in the local newspaper, and the applicant shall reimburse the District Engineer for the costs of publication. Copies of public notices will be sent to all parties who have specifically requested copies of public notices, to the U.S. Senators and Representatives for the area where the work is to be performed, the Field Representatvie of the Secretary of the Interior, the Regional Director of the Fish and Wildlife Service, the Regional Director of the National Park Service, the Regional Administrator of the Environmental Protection Agency (EPA), the Regional Director of the National Marine Fisheries Service of the National Oceanic and Atmospheric Administration (NOAA), the head of the State agency responsible for fish and wildlife resources, and the District Commander, U.S. Coast Guard.

(2) In addition to the general distribution of public notices cited above, notices will be sent to other addresses in appropriate cases as follows:

(i) If the activity involves structures or dredging along the shores of the sea or Great Lakes, to the Coastal Engineering Research Center, Washington, D.C. 20016.

(ii) If the activity involves construction of fixed structures or artificial islands on the Outer Continental Shelf or in the territorial seas, to the Deputy Assistant Secretary of Defense (Installations and Housing), Washington, D.C. 20310; the Director, Defense Mapping Agency, Hydrographic Center, Washington, D.C. 20390, Attention, Code N512; and the Director, National Ocean Survey, NOAA, Department of Commerce, Rockville, Maryland 20852.

(iii) If the activity involves the construction of structures to enhance fish propagation along the Atlantic, Pacific, and Gulf coasts, to the Director, Office of Marine Recreational Fisheries, National Marine Fisheries Service, Washington, D.C. 20235.

(iv) If the activity involves the construction of structures which may affect aircraft operations or for purposes associated with seaplane operations, to the Regional Director of the Federal Aviation Administration.

(v) If the activity is in connection with a foreign-trade zone, to the Executive Secretary, Foreign-Trade Zones Board, Department of Commerce, Washington, D.C. 20230 and to the appropriate District Director of Customs as Resident Representative, Foreign-Trade Zones Board.

(3) It is presumed that all interested parties and agencies will wish to respond to public notices; therefore, a lack of response will be interpreted as meaning that there is no objection to the application. A copy of the public notice with the list of the addressees to whom the notice was sent will be included in the record. If a question develops with respect to an activity for which another agency has responsibility and that other agency has not responded to the public notice, the District Engineer may request their comments. Whenever a response to a public notice has been received from a member of Congress, either in behalf of a constituent or himself, the District Engineer will inform the member of Congress of the final decision.

(d) *General permit notices (RCS: DAEN–CWO–52).* For purposes of performing a nationwide analysis of the effectiveness of the general permit program, Division offices will submit "Public Notices on General Permits" reports (RCS: DAEN–CWO–52) by COB on the 15th day, following the end of each quarter, to HQDA (DAEN–CWO–N) Washington, D.C. 20314. Said reports will be in the form of a letter listing the public notices published during the previous month to announce proposals or to finalize issuances of general permits; copies of the public notices are to be made inclosures to the reports. Negative reports will be submitted if no general permit actions have taken place in the Division during the reporting period.

§ 325.4 Environmental impact statements.

(a) *General.* Section 102(2)(c) of the National Environmental Policy Act of 1969 (NEPA) requires all Federal agencies, with respect to major Federal actions significantly affecting the quality of the human environment, to submit to the President's Council on Environmental Quality a detailed statement on:

(1) The environmental impact of the proposed actions.

(2) Any adverse environmental effects which cannot be avoided should the proposal be implemented.

(3) Alternatives to the proposed action.

(4) The relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity.

(5) Any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented. The District Engineer must determine whether such an Environmental Impact Statement (EIS) is required in connection with each permit application.

(b) *EIS procedures.* In addition to the procedures required by 33 CFR 209.410 (ER 1105–2–507), the following special procedures apply to the processing of permits involving the preparation of an EIS.

(1) The District Engineer, at the earliest practicable time prior to the is-

suance of the public notice, shall make a preliminary assessment of impacts of the project should it be approved and make a preliminary determination as to whether the quality of the human environment would be significantly affected. This preliminary assessment will normally be based on experience with similar type activities performed in the past. A statement of the District Engineer's preliminary determination shall be included in the public notice. This preliminary determination will be reconsidered as additional information is developed.

(2) If the District Engineer's final determination after consideration of all additional information developed (including responses to the public notice) is that the proposed work will not significantly affect the quality of the human environment, the District Engineer's determination shall be documented, dated, and placed in the record as his Environmental Assessment (see § 325.2(a)(4)).

(3) At such time as the District Engineer believes that a permit may be warranted but that the proposed activity would significantly affect the quality of the human environment, he will require the applicant to furnish any additional information that the District Engineer considers necessary to allow his preparation of an EIS. The applicant should also be advised at this time that there is no assurance that favorable action will ultimately be taken on his application. Additionally, if the District Engineer has previously announced a preliminary determination that no EIS would be required, he shall issue a supplemental public notice to advise the public of the changed determination. If the applicant is unable to furnish certain information considered by the District Engineer to be necessary for the EIS, the District Engineer may, after obtaining written approval from the Division Engineer, charge the applicant pursuant to 31 U.S.C. 483(a) for those extraordinary expenses incurred by the Government in developing the information. All money so collected shall be paid into the Treasury of the United States as miscellaneous receipts. Otherwise the costs of the preparation and distribution of the EIS itself shall be borne by the Federal Government. In those cases when the determination has been made that an EIS will be required, the District Engineer shall consider inviting public comments as to specific factors of concern which should be addressed in the draft EIS. Upon preparation of the draft EIS, a public notice shall be issued summarizing the facts of the case and announcing the availability of the draft EIS. A copy of that notice shall be furnished to all recipients of the draft EIS including CEQ. If a public hearing is to be held pursuant to § 325.2(a)(5), the hearing may be held anytime after completion of the draft EIS.

(4) If another agency is the lead agency as defined by the CEQ guidelines (40 CFR 1500.7(b)) the District Engineer will coordinate with that agency to insure that the resulting EIS adequately describes the impact of the activity which is subject to Corps permit authority. That previously prepared EIS will be referenced in the public notice announcing the permit application and a statement included that the effects of the proposed activity on the environment as outlined therein will be carefully considered in the evaluation of the permit application.

(c) *Public notice on EIS filing.* The 30-day wait period required by the National Environmental Policy Act for issuing a permit for which an EIS has been prepared begins with notation in the Federal Register that the FEIS has been filed with CEQ or on the date of delivery to U.S. Postal Service facilities for mailing of copies of the FEIS to agencies, groups, and individuals on the project mailing list, whichever date is later. In order to notify the interested public of their opportunity to comment on the FEIS, the District Engineer shall issue a public notice when the filing notation has been published in the Federal Register to all parties receiving the original application notice or draft EIS and to all others who have expressed an interest in the application. The public notice should include:

(1) A brief summary of application (applicant, work, date of public notice, date of draft EIS release, date of public hearing, if held);

(2) Opportunity to comment to the District Engineer on the FEIS until the deadline date projected by the 30-day wait period;

(3) A statement that the comments received on the FEIS will be evaluated and considered in arriving at the final decision on the application; and

(4) Information on how interested parties can obtain or have access to the FEIS.

§ 325.5 Forms of authorization.

(a) *General.* (1) Department of the Army authorizations under this regulation shall be in the form of an individual permit, general permit, or letter of permission, as appropriate. The basic format shall be ENG Form 1721, Department of the Army Permit (Appendix A).

(2) While the general conditions included in ENG Form 1721 are normally applicable to all permits, some may not apply to certain authorizations (e.g., after-the-fact situations where work is completed, or situations in which the permittee is a Federal agency) and may be deleted by the issuing officer. Special conditions applicable to the specific activity will be included in the permit as necessary to protect the public interest.

(b) *Letters of permission.* In those cases subject to Section 10 of the River and Harbor Act of 1899 in which, in the opinion of the District Engineer, the proposed work is minor, will not have significant impact on environmental values, and should encounter no opposition, the District Engineer may omit the publishing of a public notice and authorize the work by a letter of permission. However, he will coordinate the proposal with all concerned fish and wildlife agencies, Federal and State, as required by the Fish and Wildlife Coordination Act. The letter of permission will not be used to authorize the discharge of dredged or fill material into waters of the United States nor the transportation of dredged material for purposes of dumping it in ocean waters. The letter of permission will be in letter form and will identify the permittee, the authorized work and location of the work, the statutory authority (i.e., 33 U.S.C. 403), any limitations on the work, a construction time limit and a requirement for a report of completed work. A copy of the general conditions from ENG Form 1721 will be attached and will be incorporated by reference into the letter of permission.

(c) *General permits.* The District Engineer may, after compliance with the other procedures of this regulation, issue general permits for certain clearly described categories of structures or work, including discharges of dredged or fill material, requiring Department of the Army permits. After a general permit has been issued, individual activities falling within those categories that are authorized by such general permits do not have to be further authorized by the procedures of this regulation unless the District Engineer determines, on a case-by-case basis, that the public interest requires.

(d) *Section 9 permits.* Permits for structures under Section 9 of the River and Harbor Act of 1899 will be drafted during review procedures at Department of the Army level.

(e) *Nationwide permits.* Nationwide permits mean Department of the Army authorizations that have been issued by the regulations for certain specified activities nationwide. If certain conditions are met, the specified activities can take place without the need for an individual or general permit.

§ 325.6 Duration of authorizations.

(a) *General.* Department of the Army authorization may authorize both the work and the resulting use. Authorizations continue in effect until they automatically expire or are modified, suspended, or revoked.

(b) *Structures.* Authorizations for the existence of a structure or other activity of a permanent nature are usually for an indefinite duration with no expiration date cited. However, where a temporary structure is authorized, or where restoration of a waterway is contemplated, the authorization will be of limited duration with a definite expiration date. Except as provided in subparagraph (e), below, permits for the discharge of dredged material in the waters of the United States or for the transportation of dredged material for the purpose of dumping it in ocean waters will be of limited duration with a definite expiration date.

(c) *Works.* Authorizations for construction work or other activity will specify time limits for accomplishing the work or activity. The time limits will specify a date by which the work must be started, normally one year from the date

of issuance, and a date by which the work must be completed. The dates will be established by the issuing official and will provide reasonable times based on the scope and nature of the work involved. An authorization for work or other activity will automatically expire if the permittee fails to request an extension or revalidation.

(d) *Extensions of time.* Extensions of time may be granted by the District Engineer for authorizations of limited duration, or for the time limitations imposed for starting or completing the work or activity. The permittee must request the extension and explain the basis of the request, which will be granted only if the District Engineer determines that an extension is in the general public interest. Requests for extensions will be processed in accordance with the regular procedures of § 325.2, including issuance of a public notice, except that such processing is not required where the District Engineer determines that there have been no significant changes in the attendant circumstances since the authorization was issued and that the work is proceeding essentially in accordance with the approved plans and conditions.

(e) *Periodic maintenance.* If the authorized work includes periodic maintenance dredging, an expiration date for the authorization of that maintenance dredging will be included in the permit. The expiration date, which in no event is to exceed ten years from the date of issuance of the permit, will be established by the issuing official after his evaluation of the proposed method of dredging and disposal of the dredged material in accordance with the requirements of 33 CFR Parts 320 to 325. In such cases, the District Engineer shall require notification of the maintenance dredging prior to actual performance to insure continued compliance with the requirements of the regulation and 33 CFR Parts 320–324. If the permittee desires to continue maintenance dredging beyond the expiration date, he must request a revalidation of that portion of his permit which authorized the maintenance dredging. The request must be made to the District Engineer six months prior to the expiration date, and include full description of the proposed methods of dredging and disposal of dredged materials. The District Engineer will process the request for revalidation in accordance with the standard procedures including the issuance of a public notice describing the authorized work to be maintained and the proposed methods of maintenance.

§ 325.7 Modification, suspension or revocation of authorizations.

(a) *General.* The District Engineer may reevaluate the circumstance and conditions of a permit either on his own motion or as the result of periodic progress inspection, and initiate action to modify, suspend, or revoke a permit as may be made necessary by considerations of the general public interest. Among the factors to be considered are the extent of the permittee's compliance with the terms and conditions of the permit; whether or not circumstances relating to the activity authorized have changed since the permit was issued, extended or revalidated, and the continuing adequacy of the permit conditions; any significant objections to the activity authorized by the permit which were not earlier considered; revisions to applicable statutory and/or regulatory authorities; and the extent to which modification, suspension, or other action would adversely affect plans, investments and actions the permittee has reasonably made or taken in reliance on the permit. Significant increases in scope of a permitted activity will be processed as new applications for permits in accordance with Sec. 325.2, and not as modifications under this paragraph.

(b) *Modification.* The District Engineer, as a result of revaluation of the circumstances and conditions of a permit, may determine that protection of the general public interest requires a modification of the terms or conditions of the permit. In such cases, the District Engineer will hold informal consultations with the permittee to ascertain whether the terms and conditions can be modified by mutual agreement. If a mutual agreement is reached on modification of the terms and conditions of the permit, the District Engineer will give the permittee written notice of the modification, which will then become effective on such date as the District Engineer may establish, which in no event shall be less than ten days from its date of issuance. In the event a mutual agreement cannot be reached by the District Engineer and the permittee, the District Engineer will proceed in accordance with subparagraph (c), below, if immediate suspension is warranted. In cases where immediate suspension is not warranted but the District Engineer determines that the permit should be modified, he will notify the permittee of the proposed modification and reasons therefor, and that he may request a hearing. The modification will become effective on the date set by the District Engineer which shall be at least ten days after receipt of the notice unless a hearing is requested within that period. If the permittee fails or refuses to comply with the modification, the District Engineer will proceed in accordance with 33 CFR Part 326.

(c) *Suspension.* The District Engineer may suspend a permit after preparing a written determination and finding that immediate suspension would be in the general public interest. The District Engineer will notify the permittee in writing by the most expeditious means available that the permit has been suspended with the reasons therefor, and order the permittee to stop all previously authorized activities. The permittee will also be advised that following this suspension a decision will be made to either reinstate, modify, or revoke the permit, and that he may request a hearing within 10 days of receipt of notice of the suspension to present information in this matter. If a hearing is requested the procedures prescribed in 33 CFR 327 will be followed. After the completion of the hearing (or within a reasonable period of time after issuance of the notice to the permittee that the permit has been suspended if no hearing is requested), the District Engineer will take action to reinstate the permit, modify the permit, or recommend revocation of the permit in accordance with subparagraph (d), below.

(d) *Revocation.* Following completion of the suspension procedures in subparagraph (c), above, if revocation of the permit is recommended, the District Engineer will prepare a report of the circumstances and forward it together with the record of the suspension proceedings to DAEN–CWO–N. The Chief of Engineers may, prior to deciding whether or not to revoke the permit, afford the permittee the opportunity to present any additional information not made available to the District Engineer at the time he made the recommendation to revoke the permit including, where appropriate, the means by which he intends to compy with the terms and conditions of the permit. The permittee will be advised in writing of the final decision.

§ 325.8 Authority to issue or deny authorizations.

(a) *General.* Except as otherwise provided in this regulation, the Secretary of the Army subject to such conditions as he or his authorized representative may from time to time impose, has authorized the Chief of Engineers and his authorized representatives to issue or deny authorizations for construction or other work in or affecting navigable waters of the United States pursuant to Sections 10 and 14 of the Act of March 3, 1899, and Section 1 of the Act of June 13, 1902. He also has authorized the Chief of Engineers and his authorized representatives to issue or deny authorizations for the discharge of dredged or fill material in waters of the United States pursuant to Section 404 of the Federal Water Pollution Control Act Amendments of 1972 or for the transportation of dredged material for the purpose of dumping it into ocean waters pursuant to Section 103 of the Marine Protection, Research and Sanctuaries Act of 1972, as amended. The authority to issue or deny permits pursuant to Section 9 of the River and Harbor Act of March 3, 1899 has not been delegated to the Chief of Engineers or his authorized representatives.

(b) *District Engineer's authority.* District Engineers are authorized to issue in accordance with this regulation permits and letters of permission which are subject to such special conditions as are necessary to protect the public interest in the waters of the United States or ocean waters pursuant to Sections 10 and 14 of the River and Harbor Act of March 3, 1899; Section 1 of the River and Harbor Act of June 13, 1902; Section 404 of the Federal Water Pollution Control Act Amendments of 1972; and Section 103 of the Marine Protection, Research and Sanctuaries Act of 1972, as amended, in all cases in which there are no known substantive objections to the proposed work or activity or in which objections

have been resolved to the satisfaction of the District Engineer. Unless otherwise precluded by this regulation, District Engineers may issue permits over an unresolved objection of another Federal agency if that agency indicates to the District Engineer that it does not desire to refer the application to a higher level of authority for review. It is essential to the legality of a permit that it contain the name of the District Engineer as the issuing officer. However, the permit need not be signed by the District Engineer, in person; but may be signed for and in behalf of him by whoever he designates. District Engineers shall deny permits when required State or local authorization and/or certification has been denied or when a State has objected to a required certification of compliance with its coastal zone management program and the Secretary of Commerce has not reviewed the action and reached a contrary finding. A District Engineer may also deny any permit if he determines that the proposed activity is not in the public interest provided the referral requirements of § 325.8(d) below are not applicable. In such cases the Findings of Fact should be in the general format required for reports under Sec. 325.11 and must conclusively justify a denial decision. All other permit applications including those cases in § 325.7 (c) and (d) below will be referred to Division Engineers. District Engineers are also authorized to add, modify, or delete special conditions in permits, except for those conditions which have been imposed by higher authority, and to suspend permits according to the procedures of § 325.7(c).

(c) *Division Engineer's authority.* Division Engineers will review, attempt to resolve outstanding matters, and evaluate all permit applications referred by District Engineers. Division Engineers may authorize the issuance or denial of permits pursuant to Sections 10 and 14 of the River and Harbor Act of March 3, 1899; Section 1 of the River Harbor Act of June 13, 1902, Section 404 of the Federal Water Pollution Control Act Amendments of 1972; and Section 103 of the Marine Protection, Research and Sanctuaries Act of 1972, as amended; and the inclusion of conditions to those permits as may be necessary to protect the public interest in waters of the United States or ocean waters in accordance with the policies cited in this regulation. Except as provided in subparagraph (d), below, if the Division Engineer determines that issuance of a permit with or without conditions is in the public interest, but there is continuing objection to the issuance of the permit by another Federal agency, he shall advise the regional representative of that Federal agency of his intent to issue the permit. The Division Engineer shall not proceed with the issuance of a permit if, within 15 days after the date of this notice of intent to issue a permit, an authorized representative of that Federal agency indicates to the Division Engineer in writing that he wishes to bring his concerns to the Departmental level and has Departmental concurrence to do so. In such cases, the proposed permit will be forwarded to higher authority for resolution. Thereafter, a permit will be issued only pursuant to and in accordance with instructions from such higher authority. Every effort should be made to resolve differences at the Division Engineer level before referring the matttr to higher authority.

(d) *Referral to the Chief of Engineers.* Division Enginees will refer to the Chief of Engineers the following cases:

(1) When it is proposed to issue a permit and there are unresolved objections from another Federal agency which must be handled under special procedures specified in statutes or Memoranda of Understanding which thereby preclude final resolution by the Division Engineer;

(2) When the recommended decision is contrary to the stated position of the Governor of the State in which the work is to be performed;

(3) When there is substantial doubt as to authority, law, regulations, or policies applicable to the proposed activity;

(4) When the Chief of Engineers requests the case be forwarded for decision;

(5) When the proposed activity would affect the baseline used for determination of the limits of the territorial sea; and

(6) When Section 9 of the River and Harbor Act of 1899 authority is involved.

§ 325.9 Supervision and enforcement.

(a) *Inspection and monitoring.* District Engineers will assure that authorized activities are conducted and executed in conformance with approved plans and other conditions of the permits. Appropriate inspections should be made on timely occasions during performance of the activity and appropriate notices and instructions given permittees to insure that they do not depart from the approved plans. Revaluation of permits to assure compliance with its purposes and conditions will be carried out as provided in § 325.7. If there are approved material departures from the authorized plans, the District Engineer will require the permittee to furnish corrected plans showing the activity as actually performed.

(b) *Non-compliance.* Where the District Engineer determines that there has been non-compliance with the terms or conditions of a permit, he should first contact the permittee and attempt to resolve the problem. If a mutually agreeable resolution cannot be reached, a written demand for compliance will be made. If the permittee has not agreed to comply within 5 days of receipt of the demand, the District Engineer will issue an immediately effective notice of suspension in accordance with § 325.7(c) and consider initiation of appropriate legal action.

(c) *Surveillance.* For purposes of inspection of permitted activities and for surveillance of the waters of the United States for enforcement of the permit authorities the District Engineer will use all means at his disposal. All Corps of Engineers employees will be instructed to observe and report all activities in waters of the United States which would require permits. The assistance of members of the public and personnel of other interested Federal, State and local agencies to observe and report such activities will be encouraged. To facilitate this surveillance, the District Engineer will, in appropriate cases, require a copy of ENG Form 4336 to be posted conspicuously at the site of authorized activities and will make available to all interested persons information on the scope of authorized activities and the conditions prescribed in the authorizations. Furthermore, significant actions taken under § 325.7 will be brought to the attention of those Federal, State and local agencies and other persons who express particular interest in the affected activity. Surveillance in ocean waters will be accomplished primarily by the Coast Guard pursuant to section 107(c) of the Marine Protection, Research and Sanctuaries Act of 1972, as amended.

(d) *Inspection expenses.* The expenses incurred in connection with the inspection of permitted activity in waters of the United States normally will be paid by the Federal Government in accordance with the provisions of section 6 of the River and Harbor Act of 3 March 1905 (33 U.S.C. 417) unless daily supervision or other unusual expenses are involved. In such unusual cases, and after approval by the Division Engineer, the permittee will be required to bear the expense of inspections in accordance with the conditions of his permit; however, the permittee will not be required or permitted to pay the United States inspector either directly or through the District Engineer. The inspector will be paid on regular payrolls or service vouchers. The District Engineer will collect the cost from the permittee in accordance with the following:

(1) At the end of each month the amount chargeable for the cost of inspection pertaining to the permit will be collected from the permittee and will be taken up on the statement of accountability and deposited in a designated depository to the credit of the Treasurer of the United States, on account of reimbursement of the appropriation from which the expenses of the inspection were paid.

(2) If the District Engineer considers such a procedure necessary to insure the United States against loss through possible failure of the permittee to supply the necessary funds in accordance with subparagraph (1), above, he may require the permittee to keep on deposit with the District Engineer at all times an amount equal to the estimated cost of inspection and supervision for the ensuing month, such deposit preferably being in the form of a certified check, payable to the order of Treasurer of the United States. Certified checks so deposited will be carried in a special deposit account (guaranty for inspection expenses) and upon completion of the work under the permit the funds will be returned to the permittee provided he has paid the actual cost of inspection.

(3) On completion of work under a permit, and the payment of expenses by the permittee without protest, the account will be closed, and outstanding deposits returned to the permittee. If the account is protested by the permittee, it will be referred to the Division Engineer for approval before it is closed and before any deposits are returned to the permittee.

(e) *Bonds.* If the permitted activity includes restoration of the waterway to its original condition, or if the issuing official has reason to consider that the permittee might be prevented from completing work which is necessary to protect the public interest in the waterway, he may require the permittee to post a bond of sufficient amount to indemnify the government against any loss as a result of corrective action it might take.

§ 325.10 Publicity.

The District Engineer will establish and maintain a program to assure that potential applicants for permits are informed of the requirements of this regulation and of the steps required to obtain permits for activities in navigable waters or ocean waters. Whenever the District Engineer becomes aware of plans being developed by either private or public entities who might require permits in order to implement the plans, he will advise the potential applicant in writing of the statutory requirements and the provisions of this regulation. Similarly when the District Engineer is aware of changes in Corps of Engineers regulatory jurisdiction, he will issue appropriate public notices.

§ 325.11 Reports.

The report of a District Engineer on an application for a permit requiring action by the Division Engineer or by the Chief of Engineers will be in a letter form with the application and all pertinent comments, records, photographs, maps, and studies including the final Environmental Impact Statement if prepared, as inclosures. The inclosures for all cases referred to the Chief of Engineers will be in duplicate. If an EIS has been prepared, the report shall not be forwarded until expiration of the 30-day comment period following filing of the final EIS and shall address any comments received on the final EIS. The following items will be included or discussed in the report:

(a) Name of applicant.

(b) Location, character and purpose of proposed activity, including a description of any wetlands involved.

(c) Applicable statutory authorities and administrative determinations conferring Corps of Engineers regulatory jurisdiction.

(d) Other Federal, State, and local authorizations obtained or required and pending.

(e) Date of public notice and public hearings, if held, and summary of objections offered with comments of the District Engineer thereon. The comments should explain the objections and not merely refer to inclosed letters.

(f) Views of State and local authorities.

(g) Views of District Engineer concerning probable effect of the proposed work on:

(1) Navigation, present and prospective.

(2) Harbor lines, if established.

(3) Flood heights, drift and flood damage protection.

(4) Beach erosion or accretion.

(5) Fish and Wildlife.

(6) Water Quality.

(7) Aesthetics.

(8) Historic values.

(9) Recreation.

(10) Economy.

(11) Water supply.

(12) Energy needs.

(13) Land use classification and coastal zone management plans.

(h) Other pertinent remarks, such as:

(1) Extent of public and private need.

(2) Appropriate alternatives.

(3) Extent and permanence of beneficial and/or detrimental effects.

(4) Probable impact in relation to cumulative effects created by other activities.

(i) A copy of the environmental assessment or the Environmental Impact Statement. If an EIS is prepared, a summary of comments received on the final EIS together with the District Engineer's response to those comments.

(j) A discussion of conformity with the guidelines published for the discharge of dredged or fill material in waters of the United States (40 CFR Part 230) or the dumping of dredged material in ocean waters (40 CFR Parts 220 to 229), as applicable.

(k) Conclusions.

(l) Recommendations including any proposed special conditions.

APPENDIX A—PERMIT FORM

Application No. _____
Name of Applicant _____
Effective Date _____
Expiration Date (If applicable) _____

DEPARTMENT OF THE ARMY

Permit

Referring to written request dated _____ for a permit to:

( ) Perform work in or affecting navigable waters of the United States, upon the recommendation of the Chief of Engineers, pursuant to Section 10 of the Rivers and Harbors Act of March 3, 1899 (33 U.S.C. 403);

( ) Discharge dredged or fill material into waters of the United States upon the issuance of a permit from the Secretary of the Army acting through the Chief of Engineers pursuant to Section 404 of the Federal Water Pollution Control Act (86 Stat. 816, Pub. L. 92-500);

( ) Transport dredged material for the purpose of dumping it into ocean waters upon the issuance of a permit from the Secretary of the Army acting through the Chief of Engineers pursuant to Section 103 of the Marine Protection, Research and Sanctuaries Act of 1972 (86 Stat. 1052; Pub. L. 92-532); _____

_____

_____

(Here insert the full name and address of the permittee.)

is hereby authorized by the Secretary of the Army: to _____

_____

_____

_____

_____

_____

_____

(Here describe the proposed structure or activity, and its intended use. In the case of an application for a fill permit, describe the structures, if any proposed to be erected on the fill. In the case of an application for the discharge of dredged or fill material into waters of the United States or the transportation for discharge in ocean waters of dredged material, describe the type and quantity of material to be discharged.)

in _____

_____

_____

_____

_____

_____

_____

(Here to be named the ocean, river, harbor, or waterway concerned.)

at _____

_____

_____

_____

_____

_____

_____

(Here to be named the nearest well-known locality—preferably a town or city—and the distance in miles and tenths from some definite point in the same, stating whether above or below or giving direction by points of compass.)

in accordance with the plans and drawings attached hereto which are incorporated in and made a part of this permit (on drawings; give file number or other definite identification marks). Subject to the following conditions:

I. General conditions: (a) That all activities identified and authorized herein shall be consistent with the terms and conditions of this permit; and that any activities not specifically identified and authorized herein shall constitute a violation of the terms and conditions of this permit which may result in the modification, suspension or revocation of this permit, in whole or in part, as set forth more specifically in General Conditions j or k hereto, and in the institution of such legal proceedings as the United States Government may consider appropriate, whether or not this permit has been previously modified, suspended or revoked in whole or in part.

(b) That all activities authorized herein shall, if they involve, during their construction or operation, any discharge of pollutants into waters of the United States or ocean waters, be at all times consistent with applicable water quality standards, effluent limitations and standards of performance, prohibitions, pretreatment standards and management practices established pursuant to the Federal Water Pollution Control Act of 1972 (Pub. L. 92-500; 86 Stat. 816), the Marine Protection, Research and Sanctuaries Act of 1972 (Pub. L. 92-532, 86 Stat. 1052), or pursuant to applicable State and local law.

(c) That when the activity authorized herein involves a discharge during its construction or operation, of any pollutant (including dredged or fill material), into waters of the United States, the authorized activity shall, if applicable water quality standards are revised or modified during the term of this permit, be modified, if necessary, to conform with such revised or modified water

quality standards within 6 months of the effective date of any revision or modification of water quality standards, or as directed by an implementation plan contained in such revised or modified standards, or within such longer period of time as the District Engineer, in consultation with the Regional Administrator of the Environmental Protection Agency, may determine to be reasonable under the circumstances.

(d) That the discharge will not destroy a threatened or endangered species as identified under the Endangered Species Act, or endanger the critical habitat of such species.

(e) That the permittee agrees to make every reasonable effort to prosecute the construction or operation of the work authorized herein in a manner so as to minimize any adverse impact on fish, wildlife, and natural environmental values.

(f) That the permittee agrees that it will prosecute the construction or work authorized herein in a manner so as to minimize any degradation of water quality.

(g) That the permittee shall permit the District Engineer or his authorized representative(s) or designee(s) to make periodic inspections at any time deemed necessary in order to assure that the activity being performed under authority of this permit is in accordance with the terms and conditions prescribed herein.

(h) That the permittee shall maintain the structure or work authorized herein in good condition and in accordance with the plans and drawings attached hereto.

(i) That this permit does not convey any property rights, either in real estate or material, or any exclusive privileges; and that it does not authorize any injury to property or invasion of rights or any infringement of Federal, State, or local laws or regulations nor does it obviate the requirement to obtain State or local assent required by law for the activity authorized herein.

(j) That this permit may be summarily suspended, in whole or in part, upon a finding by the District Engineer that immediate suspension of the activity authorized herein would be in the general public interest. Such suspension shall be effective upon receipt by the permittee of a written notice thereof which shall indicate (1) the extent of the suspension, (2) the reasons for this action, and (3) any corrective or preventative measures to be taken by the permittee which are deemed necessary by the District Engineer to abate imminent hazards to the general public interest. The permittee shall take immediate action to comply with the provisions of this notice. Within ten days following receipt of this notice of suspension, the permittee may request a hearing in order to present information relevent to a decision as to whether his permit should be reinstated, modified or revoked. If a hearing is requested, it shall be conducted pursuant to procedures prescribed by the Chief of Engineers. After completion of the hearing, or within a reasonable time after issuance of the suspension notice to the permittee if no hearing is requested, the permit will either be reinstated, modified or revoked.

(k) That this permit may be either modified, suspended or revoked in whole or in part if the Secretary of the Army or his authorized representative determines that there has been a violation of any of the terms or conditions of this permit or that such action would otherwise be in the public interest. Any such modification, suspension, or revocation shall become effective 30 days after receipt by the permittee of written notice of such action which shall specify the facts or conduct warranting same unless (1) within the 30-day period the permittee is able to satisfactorily demonstrate that (a) the alleged violation of the terms and the conditions of this permit did not, in fact, occur or (b) the alleged violation was accidental, and the permittee has been operating in compliance with the terms and conditions of the permit and is able to provide satisfactory assurances that future operations shall be in full compliance with the terms and conditions of this permit; or (2) within the aforesaid 30-day period, the permittee requests that a public hearing be held to present oral and written evidence concerning the proposed modification, suspension or revocation. The conduct of this hearing and the procedures for making a final decision either to modify, suspend or revoke this permit in whole or in part shall be pursuant to procedures prescribed by the Chief of Engineers.

(l) That in issuing this permit, the Government has relied on the information and data which the permittee has provided in connection with his permit application. If, subsequent to the issuance of this permit, such information and data prove to be false, incomplete or inaccurate, this permit may be modified, suspended or revoked, in whole or in part, and/or the Government may, in addition, institute appropriate legal proceedings.

(m) That any modification, suspension, or revocation of this permit shall not be the basis for any claim for damages against the United States.

(n) That the permittee shall notify the District Engineer at what time the activity authorized herein will be commenced, as far in advance of the time of commencement as the District Engineer may specify, and of any suspension of work, if for a period of more than one week, resumption of work and its completion.

(o) That if the activity authorized herein is not started on or before _____ day of _____, 19—, (one year from the date of issuance of this permit unless otherwise specified) and is not completed on or before _____ day of _____, 19—, (three years form the date of issuance of this permit unless otherwise specified) this permit, if not previously revoked or specifically extended, shall automatically expire.

(p) That this permit does not authorize or approve the construction of particular structures, the authorization or approval of which may require authorization by the Congress or other agencies of the Federal Government.

(q) That if and when the permittee desires to abandon the activity authorized herein, unless such abandonment is part of a transfer procedure by which the permittee is transferring his interests herein to a third party pursuant to General Condition S hereof, he must restore the area to a condition satisfactory to the District Engineer.

(r) That if the recording of this permit is possible under applicable State or local law, the permittee shall take such action as may be necessary to record this permit with the Register of Deeds or other appropriate official charged with the responsibility for maintaining records of title to and interests in real property.

(s) That there shall be no unreasonable interference with navigation by the existence or use of the activity authorized herein.

(t) That this permit may not be transferred to a third party without prior written notice to the District Engineer, either by the transferee's written agreement to comply with all terms and conditions of this permit or by the transferee subscribing to this permit in the space provided below and thereby agreeing to comply with all terms and conditions of this permit. In addition, if the permittee transfers the interests authorized herein by conveyance of realty, the deed shall reference this permit and the terms and conditions specified herein and this permit shall be recorded along with the deed with the Register of Deeds or other appropriate official.

II. Special Conditions: Here list conditions relating specifically to the proposed structure or work authorized by this permit. The following Special Conditions will be applicable when appropriate:

Structures In or Affecting Navigable Waters of the United States

(a) That this permit does not authorize the interference with any existing or proposed Federal project and that the permittee shall not be entitled to compensation for damage or injury to the structures or work authorized herein which may be caused by or result from existing or future operations undertaken by the United States in the public interest.

(b) That no attempt shall be made by the permittee to prevent the full and free use by the public of all navigable waters at or adjacent to the activity authorized by this permit.

(c) That if the display of lights and signals on any structure or work authorized herein is not otherwise provided for by law, such lights and signals as may be prescribed by the United States Coast Guard shall be installed and maintained by and at the expense of the permittee.

(d) That the permittee, upon receipt of a notice of revocation of this permit or upon its expiration before completion of the authorized structure or work, shall, without expense to the United States and in such time and manner as the Secretary of the Army or his authorized representative may direct, restore the waterway to its former conditions. If the permittee fails to comply with the direction of the Secretary of the Army or his authorized representative, the Secretary or his designee may restore the waterway to its former condition, by contract or otherwise, and recover the cost thereof from the permittee.

(e) Structures for Small Boats: That permittee hereby recognizes the possibility that the structure permitted herein may be subject to damage by wave wash from passing vessels. The issuance of this permit does not relieve the permittee from taking all proper steps to insure the integrity of the structure permitted herein and the safety of boats moored thereto from damage by wave wash and the permittee shall not hold the United States liable for any such damage.

Maintenance Dredging

(a) That when the work authorized herein includes periodic maintenance dredging, it may be performed under this permit for —— years from the date of issuance of this permit (ten years unless otherwise indicated);

(b) That the permittee will advise the District Engineer in writing at least two weeks before he intends to undertake any maintenance dredging.

Discharges of Dredged or Fill Material Into Waters of the United States

(a) That the discharge will be carried out in conformity with the goals and objectives of the EPA Guidelines established pursuant to Section 404(b) of the FWPCA and published in 40 CFR 230;

(b) That the discharge will consist of suitable material free from toxic pollutants in other than trace quantities;

(c) That the fill created by the discharge will be properly maintained to prevent erosion and other non-point sources of pollution; and

(d) That the discharge will not occur in a component of the National Wild and Scenic River System or in a component of a State wild and scenic river system.

Dumping of Dredged Material Into Ocean Waters

(a) That the dumping will be carried out in conformity with the goals, objectives, and requirements of the EPA criteria established pursuant to Section 102 of the Marine Protection, Research and Sanctuaries Act of 1972, published in 40 CFR 220–228.

(b) That the permittee shall place a copy of this permit in a conspicuous place in the vessel to be used for the transportation and/or dumping of the dredged material as authorized herein.

This permit shall become effective on the date of the District Engineer's signature.

Permittee hereby accepts and agrees to comply with the terms and conditions of this permit.

(Permittee)

(Date)

By authority of the Secretary of the Army:

(District Engineer)

(Date)

Transferee hereby agrees to comply with the terms and conditions of this permit.

(Transferee)

(Date)

APPENDIX B—MEMORANDUM OF UNDERSTANDING BETWEEN THE SECRETARY OF THE INTERIOR AND THE SECRETARY OF THE ARMY

In recognition of the responsibilities of the Secretary of the Army under sections 10 and 13 of the Act of March 3, 1899 (33 U.S.C. 403 and 407), relating to the control of dredging, filling, and excavation in the navigable waters of the United States, and the control of refuse in such waters, and the interrelationship of those responsibilities with the responsibilities of the Secretary of the Interior under the Federal Water Pollution Control Act, as amended (33 U.S.C. 466 et seq.), the Fish and Wildlife Coordination Act, as amended (16 U.S.C. 661–666c), and the Fish and Wildlife Act of 1956, as amended (16 U.S.C. 742a et seq.), relating to the control and prevention of water pollution in such waters and the conservation of the Nation's natural resources and related environment, including fish and wildlife and recreational values therein; in recognition of our joint responsibilities under Executive Order No. 11288 to improve water quality through the prevention, control, and abatement of water pollution from Federal and federally licensed activities; and in recognition of other provisions of law and policy, we, the two Secretaries, adopt the following policies and procedures:

POLICIES

1. It is the policy of the two Secretaries that there shall be full coordination and cooperation between their respective Departments on the above responsibilities at all organizational levels, and it is their view that maximum efforts in the discharge of those responsibilities, including the resolution of differing views, must be undertaken at the earliest practicable time and at the field organizational unit most directly concerned. Accordingly, District Engineers of the U.S. Army Corps of Engineers shall coordinate with the Regional Directors of the Secretary of the Interior on fish and wildlife, recreation, and pollution problems associated with dredging, filling, and excavation operations to be conducted under permits issued under the 1899 Act in the navigable waters of the United States, and they shall avail themselves of the technical advice and assistance which such Directors may provide.

2. The Secretary of the Army will seek the advice and counsel of the Secretary of the Interior on difficult cases. If the Secretary of the Interior advises that proposed operations will unreasonably impair natural resources or the related environment, including the fish and wildlife and recreational values thereof, or will reduce the quality of such waters in violation of applicable water quality standards, the Secretary of the Army in acting on the request for a permit will carefully evaluate the advantages and benefits of the operations in relation to the resultant loss or damage, including all data presented by the Secretary of the Interior, and will either deny the permit or include such conditions in the permit as he determines to be in the public interest, including provisions that will assure compliance with water quality standards established in accordance with law.

PROCEDURES FOR CARRYING OUT THESE POLICIES

1. Upon receipt of an application for a permit for dredging, filling, excavation, or other related work in navigable waters of the United States, the District Engineers shall send notices to all interested parties, including the appropriate Regional Directors of the Federal Water Pollution Control Administration, the United States Fish and Wildlife Service, and the National Park Service of the Department of the Interior, and the appropriate State conservation, resources, and water pollution agencies.

2. Such Regional Directors of the Secretary of the Interior shall immediately make such studies and investigations as they deem necessary or desirable, consult with the appropriate State agencies, and advise the District Engineers whether the work proposed by the permit applicant, including the deposit of any material in or near the navigable waters of the United States, will reduce the quality of such waters in violation of applicable water quality standards or unreasonably impair natural resources or the related environment.

3. The District Engineer will hold public hearings on permit applications whenever response to a public notice indicates that hearings are desirable to afford all interested parties full opportunity to be heard on objections raised.

4. The District Engineer, in deciding whether a permit should be issued, shall weigh all relevant factors in reaching his decision. In any case where Directors of the Secretary of the Interior advise the District Engineers that proposed work will impair the water quality in violation of applicable water quality standards or unreasonably impair the natural resources or the related environment, he shall, within the limits of his responsibility, encourage the applicant to take steps that will resolve the objections to the work. Failing in this respect, the District Engineer shall forward the case for the consideration of the Chief of Engineers and the appropriate Regional Director of the Secretary of the Interior shall submit his views and recommendations to his agency's Washington Headquarters.

5. The Chief of Engineers shall refer to the Under Secretary of the Interior all those cases referred to him containing unresolved substantive differences of views and he shall include his analysis thereof, for the purpose of obtaining the Department of Interior's comments prior to final determination of the issues.

6. In those cases where the Chief of Engineers and the Under Secretary are unable to resolve the remaining issues, the cases will be referred to the Secretary of the Army for decision in consultation with the Secretary of the Interior.

7. If in the course of operations within this understanding, either Secretary finds its terms in need of modification, he may notify the other of the nature of the desired changes. In that event the Secretaries shall within 90 days negotiate such amendment as is considered desirable or may agree upon termination of this understanding at the end of the period.

Dated: July 13, 1967.

STEWART L. UDALL,
Secretary of the Interior.

Dated: July 13, 1967.

STANLEY RESOR,
Secretary of the Army.

PART 326—ENFORCEMENT

Sec.
326.1 Purpose.
326.2 Discovery.
326.3 Investigation.
326.4 Legal Action.
326.5 Processing After-the-fact Applications.

AUTHORITY: 33 U.S.C. 401 et seq.; 33 U.S.C. 1344; 33 U.S.C. 1413.

§ 326.1 Purpose.

This regulation prescribes the policy, practice, and procedures to be followed by the Corps of Engineers in connection with activities requiring Department of the Army permits that are performed without prior authorization.

§ 326.2 Discovery of unauthorized activity in Progress

When the District Engineer becomes aware of any unauthorized activity which is still in progress, he shall immediately issue a cease and desist order to all persons responsible for and/or involved in the performance of the activity. If appropriate, the District Engineer may also order interim protective measures to be taken in order to protect the public interest.

§ 326.3 Investigation.

The District Engineer shall commence an immediate investigation of all unauthorized activities brought to his attention to ascertain the facts surrounding the activity. In making this investigation, the District Engineer shall solicit the views of the Regional Administrator of the Environmental Protection Agency, the Regional Director of the U.S. Fish and Wildlife Service, and the Regional Director of the National Marine Fisheries Service, and other appropriate Federal, State, and local agencies. He shall also request the persons involved in the unauthorized activity to provide appropriate information on the activity to assist him in his evaluation and in recommending the course of action to be taken. The District Engineer shall evaluate the information and views developed during this investigation in conjunction with the appropriate factors and criteria that pertain to the particular unauthorized activity as cited in 33 CFR Parts 320, 321, 322, 323, and 324, and the guidance contained in § 326.4, below. Following this evaluation, the District Engineer shall formulate recommendations as to the appropriate administrative and/or legal action to be taken.

§ 326.4 **Legal action.**

(a) District Engineers shall be guided by the following policies in determining whether an unauthorized activity requires appropriate legal action:

(1) *Criminal action.* Criminal action is considered appropriate when the facts surrounding an unauthorized activity reveal the necessity for punitive action and/or when deterrence of future unauthorized activities in the area is considered essential to the establishment or maintenance of a viable permit program.

(2) *Civil action.* Civil action is considered appropriate when the preliminary evaluation of the unauthorized activity reveals that (i) restoration is in the public interest and attempts to secure voluntary restoration have failed, or (ii) the unauthorized activity is in the public interest but must be altered or modified by judicial order because attempts to secure voluntary compliance have failed, or (iii) a civil penalty under Section 309 of the FWPCA is warranted.

(b) Preparation of case. If the District Engineer determines that legal action is appropriate, he shall prepare a litigation report which shall contain an analysis of the data and information obtained during his investigation and a recommendation of appropriate civil and criminal action. In those cases where the analysis of the facts developed during his investigation (when made in conjunction with the appropriate factors and criteria specified in 33 CFR Parts 320, 321, 322, 323, and 324) leads to the preliminary conclusion that removal of the unauthorized activity is in the public interest, the District Engineer shall also recommend restoration of the area to its original or comparable condition.

(c) Referral to local U.S. Attorney. Except as provided in subsection (d), District Engineers are authorized to refer the following cases directly to the local U.S. Attorney.

(1) All unauthorized structures or work in or affecting navigable waters of the United States that fall exclusively within the purview of Section 10 of the River and Harbor Act of 1899 (see 33 CFR Part 322) for which a criminal fine or penalty under Section 12 of that Act (33 USC 406) is considered appropriate.

(2) All civil actions involving small unauthorized structures, such as piers, which the District Engineer determines are (i) not in the public interest and therefore must be removed, or (ii) are in the public interest but must be altered or modified by judicial order, because attempts to secure voluntary compliance have failed.

(3) All violations of Section 301 of the Federal Water Pollution Control Act Amendments of 1972 (33 USC 1311) involving the unauthorized discharge of dredged or fill material into the waters of the United States where the District Engineer determines, with the concurrence of the Regional Administrator, that civil and/or criminal action pursuant to Section 309 of the FWPCA is appropriate.

(4) All cases for which a temporary restraining order and/or preliminary injunction is appropriate following noncompliance with a cease and desist order.

Information copies of all letters of referral shall be forwarded to the Chief of Engineers, ATTN: DAEN–CCK, and the Chief Pollution Control Section, Land and Natural Resources Division, Department of Justice, Washington, D.C. 20530.

(d) Referral to Office, Chief of Engineers. District Engineers shall prepare and forward a litigation report to the Office, Chief of Engineers, ATTN: DAEN–CCK, for all other cases not identified in subsection (c) in which civil and/or criminal action is considered appropriate, including:

(1) All cases involving significant questions of law or fact;

(2) All cases involving discharges of dredged or fill material into waters of the United States that are not interstate waters or navigable waters of the United States, or part of a surface tributary system to these waters;

(3) All cases involving recommendations for substantial or complete restoration;

(4) All cases involving violations of Section 9 of the River and Harbor Act of 1899; and

(5) All cases involving violations of the Marine Protection, Research and Sanctuaries Act of 1972.

(e) If the District Engineer refers a case to the local U.S. Attorney or if criminal and/or civil action is instituted against the responsible person for any unauthorized activity, the District Engineer shall not accept for processing any application for a Department of the Army permit until final disposition of the referral action and/or all judicial proceedings, including the payment of all prescribed penalties and fines and/or completion of all work ordered by the court. Thereafter, the District Engineer may accept an application for a permit; provided, that with respect to any judicial order requiring partial or total restoration of an area, the District Engineer, if so ordered by the court, shall supervise this restoration effort and may allow the responsible persons to apply for a permit for only that portion of the unauthorized activity for which restoration has not been so ordered.

§ 326.5 **Processing after-the-fact applications.**

In those cases in which the District Engineer determines that the unauthorized activity does not warrant legal action, the following procedures shall be followed.

(a) Processing and evaluation of applications for after-the-fact authorizations for activities undertaken without the required Department of the Army permits will in all other respects follow the standard policies and procedures of 33 CFR Parts 320–325. Thus, authorization may still be denied in accordance with the policies and procedures of those regulations.

(b) Where after-the-fact authorization in accordance with this paragraph is determined to be in the public interest, the standard permit form for the activity will be used, omitting inappropriate conditions, and including whatever special conditions the District Engineer may deem appropriate to mitigate or prevent undesirable effects which may have occurred or might occur.

(c) Where after-the-fact authorization is not determined to be in the public interest, the notification of the denial of the permit will prescribe any corrective actions to be taken in connection with the work already accomplished, including restoration of those areas subject to denial, and establish a reasonable period of time for the applicant to complete such actions. The District Engineer, after denial of the permit, will again consider whether civil and/or criminal action is appropriate in accordance with § 326.4.

(d) If the applicant declines to accept the proposed permit conditions, or fails to take corrective action prescribed in the notification of denial, or if the District Engineer determines, after denying the permit application, that legal action is appropriate, the matter will be referred to the Chief of Engineers, ATTN: DAEN–CCK, with recommendations for appropriate action.

PART 327—PUBLIC HEARINGS

Sec.

AUTHORITY: 33 U.S.C. 1344; 33 U.S.C. 1413.

§ 327.1 **Purpose.**

This regulation prescribes the policy, practice and procedures to be followed by the U.S. Army Corps of Engineers in the conduct of public hearings conducted in the evaluation of a proposed Department of the Army permit action or Federal project as defined in § 327.3 below including those held pursuant to Section 404 of the Federal Water Pollution Control Act (FWPCA) (33 U.S.C. 1344) and Section 103 of the Marine Protection, Research and Sanctuaries Act (MPRSA), as amended (33 U.S.C. 1413).

§ 327.2 **Applicability.**

This regulation is applicable to all Divisions and Districts responsible for the conduct of public hearings.

§ 327.3 **Definitions.**

(a) Public hearing means a public proceeding conducted for the purpose of acquiring information or evidence which will be considered in evaluating a proposed Department of the Army permit action, or Federal project, and which affords to the public the opportunity to present their views, opinions, and information on such permit actions or Federal projects.

(b) Permit action, as used herein, means the review of an application for a permit pursuant to Section 10 of the

River and Harbor Act of 1899 (33 U.S.C. 403), Section 404 of the FWPCA (33 U.S.C. 1344), the Outer Continental Shelf Act (43 U.S.C. 1333(f)), and Section 103 of the MPRSA of 1972, as amended (33 U.S.C. 1413), or the modification or revocation of any Department of the Army permit. (See 33 CFR 325.7.)

(c) Federal project means a Corps of Engineers project (work or activity of any nature for any purpose which is to be performed by the Chief of Engineers pursuant to Congressional authorizations) involving the discharge of dredged or fill material into waters of the United States or the transportation of dredged material for the purpose of dumping it in ocean waters subject to Section 404 of the FWPCA (33 U.S.C. 1344), or Section 103 of the MPRSA, as amended (33 U.S.C. 1413; and 33 CFR 209.145. (This regulation supersedes all references to public meetings in 33 CFR 209.145.)

§ 327.4 General policies.

(a) A public hearing will be held in connection with the consideration of a Department of the Army permit application under Section 404 of the FWPCA or Section 103 of the MPRSA, or a Federal project whenever a public hearing will assist in making a decision on such permit application or Federal project. In addition, a public hearing may be held when it is proposed to modify or revoke a permit. (See 33 CFR 325.7.)

(b) Unless the public notice specifies that a public hearing will be held, any person may request, in writing, within the comment period specified in the public notice on a Department of the Army permit application under Section 404 of the FWPCA or Section 103 of the MPRSA or on a Federal project, that a public hearing be held to consider the material matters in issue in the permit application or Federal project. Upon receipt of any such request, stating with particularity the reasons for holding a public hearing, the District Engineer shall promptly set a time and place for the public hearing, and give due notice thereof, as prescribed in § 327.11 below. Requests for a public hearing under this paragraph shall be granted, unless the District Engineer determines that the issues raised are insubstantial or there is otherwise no valid interest to be served by a hearing. The District Engineer will make such a determination in writing, and communicate his reasons therefor to all requesting parties.

(c) In cases involving the evaluation of a Department of the Army permit application only under Section 10 of the River and Harbor Act of 1899 (33 U.S.C. 403), public hearings will be held upon written request whenever the District Engineer determines that there is sufficient public interest to warrant such action. Among the instances warranting public hearings are general public opposition to a proposed work, Congressional requests or requests from responsible local authorities, or controversial cases involving significant environmental issues.

(d) In case of doubt, a public hearing shall be held. HQDA has the discretionary power to require hearings in any case.

(e) In fixing the time and place for a hearing, due regard shall be had for the convenience and necessity of the interested public.

§ 327.5 Presiding officer.

(a) The District Engineer, in whose District a matter arises, shall normally serve as the Presiding Officer. When the District Engineer is unable to serve, he may designate the Deputy District Engineer as such Presiding Officer. In any case, he may request the Division Engineer to designate another Presiding Officer. In cases of unusual interest, the Chief of Engineers reserves the power to appoint such person as he deems appropriate to serve as the Presiding Officer.

(b) The Presiding Officer in each case shall establish a hearing file. The hearing file shall include a copy of any permit application or permits and supporting data, any public notices issued in the case, the request or requests for the hearing and any data or material submitted in justification thereof, materials submitted in opposition to the proposed action, the hearing transcript, and such other material as may be relevant or pertinent to the subject matter of the hearing. The hearing file shall be available for public inspection with the exception of material exempt from disclosure under the Freedom of Information Act.

§ 327.6 Legal adviser.

In each public hearing, the District Counsel or his designee shall serve as legal adviser to the Presiding Officer in ruling upon legal matters and issues that may arise.

§ 327.7 Representation.

At the public hearing, any person may appear on his own behalf, and may be represented by counsel, or by other representatives.

§327.8 Conduct of hearings.

(a) Hearings shall be conducted by the Presiding Officer in an orderly but expeditious manner. Any person shall be permitted to submit oral or written statements concerning the subject matter of the hearing, to call witnesses who may present oral statements, and to present recommendations as to an appropriate decision. Any person may present written statements for the hearing file prior to the time the hearing file is closed to public submissions, and may present proposed findings and recommendations. The Presiding Officer shall afford participants an opportunity for rebuttal.

(b) The Presiding Officer shall have discretion to establish reasonable limits upon the time allowed for statements of witnesses, for arguments of parties or their counsel or representatives, and upon the number of rebuttals.

(c) Cross-examination of witnesses shall not be permitted.

(d) All public hearings shall be reported verbatim. Copies of the transcripts of proceedings may be purchased by any person from the Corps of Engineers or the reporter of such hearing. A copy will be available for public inspection at the office of the appropriate District Engineer.

(e) All written statements, charts, tabulations, and similar data offered in evidence at the hearing shall, subject to exclusion by the Presiding Officer for reasons of redundancy, be received in evidence and shall constitute a part of the hearing file.

(f) At any hearing, the Presiding Officer shall make an opening statement, outlining the purpose of the hearing and prescribing the general procedures to be followed. The Presiding Officer shall afford participants an opportunity to respond to his opening statement.

(g) The Presiding Officer shall allow a period of 10 days after the close of the public hearing for submission of written comments. After such time has expired, unlesss such period is extended by the Presiding Officer or the Chief of Engineers for good cause, the hearing file shall be closed to additional public written comments.

(h) In appropriate cases, the District Engineer may participate in joint public hearings with other Federal or State agencies, provided the procedures of those hearings meet the requirements of this regulation. In those cases in which the other Federal or State agency is required to allow cross-examination in its public hearing, the District Engineer may still participate in the joint public hearing but shall not require cross examination as a part of his participation.

(i) The procedures in subparagraphs (d), (f) and (g) of this Section may be waived by the Presiding Officer in appropriate cases.

§ 327.9 Filing of transcript of the public hearing.

Where the Presiding Officer is the initial action authority, the transcript of the public hearing, together with all evidence introduced at the public hearing, shall be made a part of the administrative record of the permit action or Federal project. The initial action authority shall fully consider the matters discussed at the public hearing in arriving at his initial decision or recommendation and shall address, in his decision or recommendation, all substantial and valid issues presented at the hearing. Where a person other than the initial action authority serves as Presiding Officer, such person shall forward the transcript of the public hearing and all evidence received in connection therewith to the initial action authority together with a report summarizing the issues covered at the hearing. The report of the Presiding Officer and the transcript of the public hearing and evidence submitted there shall in such cases be fully considered by the initial action authority in making his decision or recommendation to higher authority as to such permit action or Federal project.

§ 327.10 Powers of the Presiding Officer.

Presiding Officers shall have the following powers:

(a) To regulate the course of hearing including the order of all sessions and the scheduling thereof, after any initial session, and the recessing, reconvening, and adjournment thereof; and

(b) To take any other action necessary or appropriate to the discharge of the duties vested in them, consistent with the statutory or other authority under which the Chief of Engineers functions, and with the policies and directives of the Chief of Engineers and the Secretary of the Army.

§ 327.11 Public notice.

(a) Public notice shall be given of any public hearing to be held pursuant to this regulation. Such notice shall provide for a period of not less than 30 days following the date of public notice during which time interested parties may prepare themselves for the hearing, except that, in cases of public necessity, a shorter time may be allowed. Notice shall also be given to all Federal agencies affected by the proposed action, and to State and local agencies having an interest in the subject matter of the hearing. Notice shall be sent to all persons requesting a hearing and shall be posted in appropriate government buildings and published in newspapers of general circulation.

(b) The notice shall contain time, place, and nature of hearing; the legal authority and jurisdiction under which the hearing is held; and location of and availability of the draft Environmental Impact Statement or Environmental Assessment.

PART 328—HARBOR LINES

Sec.

AUTHORITY: 33 U.S.C. 401 et seq.

§ 328.1 Purpose and scope.

This regulation prescribes the policy, practice and procedures concerning harbor lines and any work in navigable waters of the United States shoreward of such lines.

§ 328.2 Applicability.

This regulation is applicable to all Corps of Engineers activities and installations having Civil Works responsibilities.

§ 328.3 References.

(a) Section 11 of the River and Harbor Act of 1899 (33 U.S.C. 404).

(b) Section 10 of the River and Harbor Act of 1899 (33 U.S.C. 403).

(c) Public Law 91-190, the National Environmental Policy Act of 1969.

§ 328.4 Definition.

The term "harbor line(s)" is used here in its generic sense. It includes types of harbor lines frequently referred to by other names, including, for example, pierhead lines and bulkhead lines.

§ 328.5 The purpose of harbor lines.

(a) Under previous policies, practices and procedures, riparian owners could erect open pile structures or undertake solid fill construction shoreward of established harbor lines without obtaining a permit under 33 U.S.C. 403. This was a matter of great concern, particularly in cases involving long established harbor lines, since all factors affecting the public interest may not have been taken into account at the time the lines were established. Accordingly, under previous policies, practices and procedures there was the danger that work shoreward of existing harbor lines could be undertaken without appropriate consideration having been given to the impact which such work may have on the environment and without a judgment having been made as to whether or not the work was, on balance, in the public interest.

(b) In order to assure that the public interest will be considered and protected in all instances, all existing and future harbor lines were declared on 27 May 1970 (33 CFR 209.150) to be guidelines for defining, with respect to the impact on navigation interests alone, the offshore limits of open pile structures (pierhead lines) or fills (bulkhead lines). A permit under 33 USC 403 is required in each case for any work which is commenced shoreward of existing or future harbor lines after 27 May 1970. Applications for permits for work in navigable waters of the United States shoreward of harbor lines shall be filed and processed in accordance with the provisions of 33 CFR Part 325. No permit is required for work completed or commenced prior to 27 May 1970 in conformance with existing harbor line authority.

§ 328.6 Establishment or modification of harbor lines.

Applications for the establishment of new harbor lines or the modification of existing harbor lines will be processed in a manner similar to applications for permits for work in navigable waters of the United States. Public notice concerning any such application will be sent to all parties known or believed to be interested in the application and a copy of the notice will be posted in post offices or other public places in the area. Public notices, apart from providing information relative to any harbor line application, shall make it clear that harbor lines are guidelines for defining, with respect to the impact on navigation interests alone, the offshore limits of open pile structures or fills and that the establishment of a harbor line carries with it no presumption that individual applications for permits to undertake work shoreward of any harbor line will be granted. Public hearings will be held in connection with applications for the establishment or modification of harbor lines whenever there appears to be sufficient public interest to justify the holding of a public hearing or when responsible Federal, State or local authorities, including Members of the Congress, request that a hearing be held and it is likely that information will be presented at the hearing that will be of assistance in determining whether the harbor line should be established or modified. District Engineers will forward all recommendations concerning the establishment or modification of harbor lines through the appropriate Division Engineer to the Office of the Chief of Engineers, DAEN-CWO-N. No new harbor lines will be established and no existing harbor lines will be modified unless specifically authorized by the Chief of Engineers.

PART 329—DEFINITION OF NAVIGABLE WATERS OF THE UNITED STATES

Sec.

AUTHORITY: 33 U.S.C. 401 et seq.

§ 329.1 Purpose.

This regulation defines the term "navigable waters of the United States" as it is used to define authorities of the Corps of Engineers. It also prescribes the policy, practice and procedure to be used in determining the extent of the jurisdiction of the Corps of Engineers and in answering inquiries concerning "navigable waters."

§ 329.2 Applicability.

This regulation is applicable to all Corps of Engineers Districts and Divisions having Civil Works responsibilities.

§ 329.3 General policies.

Precise definitions of "navigable waters" or "navigability" are ultimately dependent on judicial interpretation, and cannot be made conclusively by administrative agencies. However, the policies and criteria contained in this regulation are in close conformance with the tests used by the Federal Courts and determinations made under this regulation are considered binding in regard to the activities of the Corps of Engineers.

§ 329.4 General definition.

Navigable waters of the United States are those waters that are subject to the ebb and flow of the tide and/or are presently used, or have been used in the past, or may be susceptible for use to transport interstate or foreign commerce. A determination of navigability,

once made, applies laterally over the entire surface of the waterbody, and is not extinguished by later actions or events which impede or destroy navigable capacity.

§ 329.5 General scope of determination.

The several factors which must be examined when making a determination whether a waterbody is a navigable water of the United States are discussed in detail below. Generally, the following conditions must be satisfied:

(a) Past, present, or potential presence of interstate or foreign commerce;

(b) Physical capabilities for use by commerce as in subparagraph (a) above; and

(c) Defined geographic limits of the waterbody.

§ 329.6 Interstate or foreign commerce

(a) *Nature of Sommerce: type, means, and extent of use.* The types of commercial use of a waterway are extremely varied and will depend on the character of the region, its products, and the difficulties or dangers of navigation. It is the waterbody's capability of use by the public for purposes of transportation of commerce which is the determinative factor, and not the time, extent or manner of that use. As discussed in § 329.9 below, it is sufficient to establish the potential for commercial use at any past, present, or future time. Thus, sufficient commerce may be shown by historical use of canoes, bateaux, or other frontier craft, as long as that type of boat was common or well-suited to the place and period. Similarly, the particular items of commerce may vary widely, depending again on the region and period. The goods involved might be grain, furs, or other commerce of the time. Logs are a common example; transportation of logs has been a substantial and well-recognized commercial use of many navigable waters of the United States. Note, however, that the mere presence of floating logs will not of itself make the river "navigable"; the logs must have been related to a commercial venture. Similarly, the presence of recreational craft may indicate that a waterbody is capable of bearing some forms of commerce, either presently, in the future, or at a past point in time.

(b) *Nature of commerce: interstate and intrastate.* Interstate commerce may of course be existent on an intrastate voyage which occurs only between places within the same state. It is only necessary that goods may be brought from, or eventually be destined to go to, another state. (For purposes of this regulation, the term "interstate commerce" hereinafter includes "foreign commerce" as well.)

§ 329.7 Intrastate or interstate nature of waterway.

A waterbody may be entirely within a state, yet still be capable of carrying interstate commerce. This is especially clear when it physically connects with a generally acknowledged avenue of interstate commerce, such as the ocean or one of the Great Lakes, and is yet wholly within one state. Nor is it necessary that there be a physically navigable connection across a state boundary. Where a waterbody extends through one or more states, but substantial portions, which are capable of bearing interstate commerce, are located in only one of the states, the entirety of the waterway up to the head (upper limit) of navigation is subject to Federal jurisdiction.

§ 329.8 Improved or natural conditions of the waterbody.

Determinations are not limited to the natural or original condition of the waterbody. Navigability may also be found where artificial aids have been or may be used to make the waterbody suitable for use in navigation.

(a) *Existing improvements: artificial waterbodies.* (1) An artificial channel may often constitute a navigable water of the United States, even though it has been privately developed and maintained, or passes through private property. The test is generally as developed above, that is, whether the waterbody is capable of use to transport interstate commerce. Canals which connect two navigable waters of the United States and which are used for commerce clearly fall within the test, and themselves become navigable. A canal open to navigable waters of the United States on only one end is itself navigable where it in fact supports interstate commerce. A canal or other artificial waterbody that is subject to ebb and flow of the tide is also a navigable water of the United States.

(2) The artificial waterbody may be a major portion of a river or harbor area or merely a minor backwash, slip, or turning area. (See § 329.12(b).)

(3) Private ownership of the lands underlying the waterbody, or of the lands through which it runs, does not preclude a finding of navigability. Ownership does become a controlling factor if a privately constructed and operated canal is not used to transport interstate commerce nor used by the public; it is then not considered to be a navigable water of the United States. However, a private waterbody, even though not itself navigable, may so affect the navigable capacity of nearby waters as to nevertheless be subject to certain regulatory authorities.

(b) *Non-existing improvements, past or potential.* A waterbody may also be considered navigable depending on the feasibility of use to transport interstate commerce after the construction of whatever "reasonable" improvements may potentially be made. The improvements need not exist, be planned, nor even authorized; it is enough that potentially they could be made. What is a "reasonable" improvement is always a matter of degree; there must be a balance between cost and need at a time when the improvement would be (or would have been) useful. Thus, if an improvement were "reasonable" at a time of past use, the water was therefore navigable in law from that time forward. The changes in engineering practices or the coming of new industries with varying classes of freight may affect the type of the improvement; those which may be entirely reasonable in a thickly populated, highly developed industrial region may have been entirely too costly for the same region in the days of the pioneers. The determination of reasonable improvement is often similar to the cost analyses presently made in Corps of Engineers studies.

§ 329.9 Time at which commerce exists or determination is made.

(a) *Past use.* A waterbody which was navigable in its natural or improved state, or which was susceptible of reasonable improvement (as discussed in § 329.8(b) above) retains its character as "navigable in law" even though it is not presently used for commerce, or is presently incapable of such use because of changed conditions or the presence of obstructions. Nor does absence of use because of changed economic conditions affect the legal character of the waterbody. Once having attained the character of "navigable in law," the Federal authority remains in existence, and cannot be abandoned by administrative officers or court action. Nor is mere inattention or ambiguous action by Congress an abandonment of Federal control. However, express statutory declarations by Congress that described portions of a waterbody are nonnavigable, or have been abandoned, are binding upon the Department of the Army. Each statute must be carefully examined, since Congress often reserves the power to amend the Act, or assigns special duties of supervision and control to the Secretary of the Army or Chief of Engineers.

(b) *Future or potential use.* Navigability may also be found in a waterbody's susceptibility for use in its ordinary condition or by reasonable improvement to transport interstate commerce. This may be either in its natural or improved condition, and may thus be existent although there has been no actual use to date. Non-use in the past therefore does not prevent recognition of the potential for future use.

§ 329.10 Existence of obstructions.

A stream may be navigable despite the existence of falls, rapids, sand bars, bridges, portages, shifting currents, or similar obstructions. Thus, a waterway in its original condition might have had substantial obstructions which were overcome by frontier boats and/or portages, and nevertheless be a "channel" for commerce, even though boats had to be removed from the water in some stretches, or logs be brought around an obstruction by means of artificial chutes. However, the question is ultimately a matter of degree, and it must be recognized that there is some point beyond which navigability could not be established.

§ 329.11 Geographic and jurisdictional limits of rivers and lakes.

(a) *Jurisdiction over entire bed.* Federal regulatory jurisdiction, and powers of improvement for navigation, extend laterally to the entire water surface and bed of a navigable waterbody, which includes all the land and waters below the ordinary high water mark.

(1) The "ordinary high water mark" on non-tidal rivers is the line on the shore established by the fluctuations of water and indicated by physical characteristics such as a clear, natural line impressed on the bank; shelving; changes in the character of soil; destruction of terrestrial vegetation; the presence of litter and debris; or other appropriate means that consider the characteristics of the surrounding areas.

(2) Ownership of a river or lake bed or of the lands between high and low water marks will vary according to state law; however, private ownership of the underlying lands has no bearing on the existence or extent of the dominant Federal jurisdiction over a navigable waterbody.

(b) *Upper limit of navigability.* The character of a river will, at some point along its length, change from navigable to non-navigable. Very often that point will be at a major fall or rapids, or other place where there is a marked decrease in the navigable capacity of the river. The upper limit will therefore often be the same point traditionally recognized as the head of navigation, but may, under some of the tests described above, be at some point yet further upstream.

§ 329.12 Geographic and jurisdictional limits of oceanic and tidal waters.

(a) *Ocean and coastal waters.* The navigable waters of the United States over which Corps of Engineers regulatory jurisdiction extends include all ocean and coastal waters within a zone three geographic (nautical) miles seaward from the coast line. Wider zones are recognized for special regulatory powers, such as those exercised over the Outer Continental Shelf.

(1) *Coast line defined.* Generally, where the shore directly contacts the open sea, the line on the shore reached by the ordinary low tides comprises the coast line from which the distance of three geographic miles is measured. On the Pacific coast the line of mean lower low water is used. The line has significance for both domestic and international law (in which it is termed the "baseline"), and is subject to precise definitions. Special problems arise when offshore rocks, islands, or other bodies exist, and the line may have to be drawn to seaward of such bodies.

(2) *Shoreward limit of jurisdiction.* Regulatory jurisdiction in coastal areas extends to the line on the shore reached by the plane of the mean (average) high water. However, on the Pacific coast, the line reached by the mean of the higher high waters is used. Where precise determination of the actual location of the line becomes necessary, it must be established by survey with reference to the available tidal datum, preferably averaged over a period of 18.6 years. Less precise methods, such as observation of the "apparent shoreline" which is determined by reference to physical markings, lines of vegetation, or changes in type of vegetation, may be used only where an estimate is needed of the line reached by the mean high water.

(b) *Bays and estuaries.* Regulatory jurisdiction extends to the entire surface and bed of all waterbodies subject to tidal action. Jurisdiction thus extends to the edge (as determined by § 329.12(a)(2) above) of all such waterbodies, even though portions of the waterbody may be extremely shallow, or obstructed by shoals, vegetation, or other barriers. Marshlands and similar areas are thus considered "navigable in law," but only so far as the area is subject to inundation by the mean high waters. The relevant test is therefore the presence of the mean high tidal waters, and not the general test described above, which generally applies to inland rivers and lakes.

§ 329.13 Geographic limits: shifting boundaries.

Permanent changes of the shoreline configuration result in similar alterations of the boundaries of the navigable waters of the United States. Thus, gradual changes which are due to natural causes and are perceptible only over some period of time constitute changes in the bed of a waterbody which also change the shoreline boundaries of the navigable waters of the United States. However, an area will remain "navigable in law," even though no longer covered with water, whenever the change has occurred suddenly, or was caused by artificial forces intended to produce that change. For example, shifting sand bars within a river or estuary remain part of the navigable water of the United States, regardless that they may be dry at a particular point in time.

§ 329.14 Determination of navigability.

(a) *Effect on determinations.* Although conclusive determinations of navigability can be made only by Federal Courts, those made by Federal agencies are nevertheless accorded substantial weight by the courts. It is therefore necessary that when jurisdictional questions arise, District personnel carefully investigate those waters which may be subject to Federal regulatory jurisdiction under the guidelines set out above, as the resulting determination may have substantial impact upon a judicial body. Official determinations by an agency made in the past can be revised or reversed as necessary to reflect changed rules or interpretations of the law.

(b) *Procedures of determination.* A determination whether a waterbody is a navigable water of the United States will be made by the Division Engineer, and will be based on a report of findings prepared at the District level in accordance with the criteria set out in this regulation. Each report of findings will be prepared by the District Engineer, accompanied by an opinion of the District Counsel, and forwarded to the Division Engineer for a final determination. Each report of findings will be based substantially on applicable portions of the format in subparagraph (c) below.

(c) Suggested format of report of findings:

(1) Name of waterbody.....
(2) Tributary to.....
(3) Physical characteristics.....
(i) Type: (river, bay slough, estuary, etc.).....
(ii) Length .....
(iii) Approximate discharge volumes:
Maximum .....
Minimum .....
Mean .....
(iv) Fall per mile.....
(v) Extent of tidal influence.....
(vi) Range between ordinary high and ordinary low water.....
(vii) Description of improvements to navigation not listed in subparagraph (5) below .....
(4) Nature and location of significant obstructions to navigation in portions of the waterbody used or potentially capable of use in interstate commerce.....
(5) Authorized projects.....
(i) Nature, condition and location of any improvements made under projects authorized by Congress.....
(ii) Description of projects authorized but not constructed.....
(iii) List of known survey documents or reports describing the waterbody.....
(6) Past or present interstate commerce.....
(i) General types, extent, and period in time .....
(ii) Documentation if necessary.....
(7) Potential use for interstate commerce, if applicable.....
(i) If in natural condition.....
(ii) If improved.....
(8) Nature of jurisdiction known to have been exercised by Federal agencies if any.....
(9) State or Federal court decisions relating to navigability of the waterbody, if any.....
(10) Remarks .....
(11) Finding of navigability (with date) and recommendation for determination.....

§ 329.15 Inquiries regarding determinations.

(a) Findings and determinations should be made whenever a question arises regarding the navigability of a waterbody. Where no determination has been made, a report of findings will be prepared and forwarded to the Division Engineer, as described above. Inquiries may be answered by an interim reply which indicates that a final agency determination must be made by the Division Engineer. If a need develops for an emergency determination, District Engineers may act in reliance on a finding prepared as in § 329.14 above. The report of findings should then be forwarded to the Division Engineer on an expedited basis.

(b) Where determinations have been made by the Division Engineer, inquiries regarding the navigability of specific portions of waterbodies covered by these determinations may be answered as follows:

This Department, in the administration of the laws enacted by Congress for the protection and preservation of the navigable waters of the United States, has determined that ..... (River) (Bay) (Lake, etc.) is a navigable water of the United States from ..... to ..... Actions which modify or otherwise affect those waters are subject to the jurisdiction of this Department,

whether such actions occur within or outside the navigable areas.

(c) Specific inquiries regarding the jurisdiction of the Corps of Engineers can be answered only after a determination whether (1) the waters are navigable waters of the United States or (2) if not navigable, whether the proposed type of activity may nevertheless so affect the navigable waters of the United States that the assertion of regulatory jurisdiction is deemed necessary.

§ 329.16 Use and maintenance of lists of determinations.

(a) Tabulated lists of final determinations of navigability are to be maintained in each District office, and be updated as necessitated by court decisions, jurisdictional inquiries, or other changed conditions.

(b) It should be noted that the lists represent only those waterbodies for which determinations have been made; absence from that list should not be taken as an indication that the waterbody is not navigable.

(c) Deletions from the list are not authorized. If a change in status of a waterbody from navigable to non-navigable is deemed necessary, an updated finding should be forwarded to the Division Engineer; changes are not considered final until a determination has been made by the Division Engineer.

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federal register

TUESDAY, JULY 19, 1977
PART III

DEPARTMENT OF HEALTH, EDUCATION, AND WELFARE

Food and Drug Administration

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SPECIAL DIETARY FOODS LABEL STATEMENTS

Proposed Statement of Reasons, Findings of Fact, and Conclusions and Tentative Order

DEPARTMENT OF HEALTH, EDUCATION, AND WELFARE

Food and Drug Administration

[21 CFR Part 105]

[Docket No. 75N-0318]

SPECIAL DIETARY FOODS LABEL STATEMENTS

Proposed Statement of Reasons, Proposed Findings of Fact, Proposed Conclusions, and Tentative Order

AGENCY: Food and Drug Administration.

ACTION: Tenative Order Following a Public Hearing on Regulations.

SUMMARY: This tentative order revises label statements for special dietary food. It is issued following a public hearing on special dietary food regulations. The regulations in the tentative order would govern label statements on special dietary foods for use in reducing or maintaining body weight or caloric intake, or in the diet of diabetics, and prevent misleading label statements on foods that are not useful for these purposes.

DATE: Exceptions by August 18, 1977.

ADDRESS: Written exceptions to the Hearing Clerk (HFC-20), Food and Drug Administration, Rm. 4-65, 5600 Fishers Lane, Rockville, Md. 20857.

TENTATIVE EFFECTIVE DATE: Labeling may be changed to comply with any regulations issued as a result of this tentative order on the date of publication of the final order in the FEDERAL REGISTER; all products initially introduced into interstate commerce shall comply by July 1, 1979.

FOR FURTHER INFORMATION CONTACT:

Richard T. Hunt, Compliance Regulations Policy Staff (HFC-10), Food and Drug Administration, Department of Health, Education, and Welfare, 5600 Fishers Lane, Rockville, Md. 20857, 301-443-3480.

SUPPLEMENTARY INFORMATION: In the matter of revising regulations for food for special dietary uses, the Commissioner of Food and Drugs is issuing a tentative order, following a public hearing, setting forth regulations with respect to label statements on special dietary foods for use in reducing or maintaining body weight, or in the diet of diabetics, and to related misleading label statements on other foods.

The section numbers discussed in this document were recodified in the FEDERAL REGISTER of March 15, 1977 (42 FR 14302). For the convenience of the readers, the recodified sections are indicated by the word "formerly" or "now" following the section numbers.

HISTORY

1. On the initiative of the Commissioner of Food and Drugs, a notice of proposed rule making in the above-identified matter was published in the FEDERAL REGISTER of June 20, 1962 (27 FR 5815), and numerous comments were received in response thereto. Subsequently, orders were published in the FEDERAL REGISTER of June 18, 1966 (31 FR 8521 et seq.), to become effective December 15, 1966, deleting §1.11 (21 CFR 1.11), excepting from labeling requirements certain artificially sweetened foods (21 CFR 5.5), establishing definitions and standards of identity for dietary supplements of vitamins and minerals and for vitamin and mineral-fortified foods (21 CFR Part 80, now 21 CFR Part 105), and revising the regulations for the labeling of food for special dietary uses (21 CFR Part 125, now 21 CFR Part 105).

2. During the 30-day period provided by the orders of June 18, 1966, objections and requests for a public hearing were filed. Consequently, an order was published in the FEDERAL REGISTER of December 14, 1966 (31 FR 15730), staying the effective date of § 5.5, Part 80, and Part 125, and staying the effective date of the deletion of § 1.11, as published June 18, 1966. The order of December 14, 1966, gave notice that a public hearing would be held on the basis of the objections received, and set forth the issues to be decided at the hearing. Since the order also contained amendments to the provisions of Parts 80 and 125 published in the FEDERAL REGISTER of June 18, 1966, an additional period of 30 days was provided for the filing of objections by persons adversely affected. Numerous letters objecting to the amendments and requesting a public hearing were received; however, no substantive issues not already stated in the order of December 14, 1966, were raised by these objections. A correction of a printer's error in the order of December 14, 1966, was published in the FEDERAL REGISTER of December 21, 1966 (31 FR 16312).

3. A notice was published in the FEDERAL REGISTER of April 2, 1968 (33 FR 5268), scheduling a hearing to begin May 21, 1968, and a prehearing conference to begin May 7, 1968. The notice also designated Mr. David H. Harris as the Hearing Examiner for these proceedings, and notice that he was appointed a hearing examiner was published in the FEDERAL REGISTER of May 4, 1968 (33 FR 6828).

4. The hearing was convened as scheduled May 21, 1968, and recessed the same day to permit continuation of prehearing conferences. Notice was given in the FEDERAL REGISTER of June 13, 1968 (33 FR 8679), that the hearing was being reconvened June 20, 1968. The hearing was reconvened as scheduled and continued for almost 2 years, closing on May 14, 1970.

5. The taking of evidence with reference to infant foods was closed October 14, 1969. Pursuant to 21 CFR 2.96, and limited to the infant food portion of the proceedings, the Hearing Examiner submitted his report and certified the record together with his report to the Commissioner of Food and Drugs. This Hearing Examiner's report, dated August 26, 1970, is part of the public record (Docket No. FDC-79) on file with the Hearing Clerk, Department of Health, Education, and Welfare, Rm. 4-65, 5600 Fishers Lane, Rockville, MD 20857.

6. The Hearing Examiner subsequently submitted his report of the entire proceedings, except for the previously submitted portion on infant foods, and certified the associated record together with his report to the Commissioner of Food and Drugs. This Hearing Examiner's report, dated January 25, 1971, is part of the public record (Docket No. FDC-78) and is also on file with the Hearing Clerk.

7. Final orders have already been published on all matters within the scope of the proceeding except the matters covered by this tentative order. After review of the Hearing Examiner's report and related material, the Commissioner issued final orders on § 125.5 (now § 105.-65) (label statements relating to infant foods) in the FEDERAL REGISTER of December 10, 1971 (36 FR 23553); to hypoallergenic foods (21 CFR 125.8, now 21 CFR 105.62) and to food for use as a means of regulating the intake of sodium (21 CFR 125.9, now 21 CFR 105.69) in the FEDERAL REGISTER of May 17, 1972 (37 FR 9763); and to definitions, interpretation of terms, general label statements, and vitamins and minerals (21 CFR 125.1, 125.2 and 125.3, now 21 CFR 105.3, 105.60, and 105.77) in the FEDERAL REGISTER of August 2, 1973 (38 FR 20708).

8. The Commissioner's final order on label statements relating to definitions, interpretations of terms, general label statements, and vitamins and minerals was stayed pending the outcome of judicial review pursuant to an order published in the FEDERAL REGISTER of October 26, 1973 (38 FR 29577). The record relating to that order was reopened for certain limited purposes pursuant to judicial remand in "National Nutritional Foods v. FDA," 504 F.2d 761 (2d Cir. 1974). In the FEDERAL REGISTER of October 19, 1976 (41 FR 46156), FDA issued final revised regulations governing vitamin and mineral products in compliance with the remand directions and the new amendments to the Federal Food, Drug, and Cosmetic Act concerning vitamins and minerals. In that order, FDA revised §§ 125.1, 125.2, and 125.3 (now §§ 105.3, 105.60, and 105.77) revoked § 125.4 and amended § 125.5 (now § 105.-65), to delete the reference to § 125.4. In the FEDERAL REGISTER of April 19, 1977 (42 FR 20292), the Commissioner ruled on two petitions for reconsideration, and generally reaffirmed the regulations but revised the regulations on some matters.

LIMITED SCOPE OF THIS ACTION

9. This document pertains only to regulations concerning limited matters relating to the labeling of foods for special dietary use because of usefulness in reducing or maintaining caloric intake or body weight or in the diet of diabetics and related misleading statements (21 CFR 105.66 and 105.67 of the tentative order).

10. The regulations in the tentative order with respect to foods for use in reducing or maintaining caloric intake or

body weight or for use in the diet of diabetics were designated 21 CFR 125.5 and 125.6, respectively, in the regulations on which the hearing was held, as revised and stayed by the order of December 14, 1966. To be compatible with the current format of Part 125 (now Part 105) in the Code of Federal Regulations, any final regulations issued on these matters will be designated 21 CFR 105.66 and 105.67, respectively.

11. With the issuance of a final order on the matters covered by this tentative order, the rulemaking proceeding, commenced in 1962, to revise the regulations for foods for special dietary uses, will be substantially completed. The record will remain open only for certain limited purposes to take appropriate action in the light of judicial review of the final orders issued in this proceeding.

Relationship to Proposed Rule on Saccharin

12. By notice published in the Federal Register of April 15, 1977 (42 FR 19996), the Commissioner proposed to prohibit the use of saccharin as a food additive, including its use in "diet" soft drinks. The proceeding to establish labeling requirements for special dietary foods and prevent deceptive claims started in 1962 and long preceded the current studies relating to safety of saccharin. The regulations as originally proposed, and the regulations stayed for the public hearing, set forth labeling provisions governing special dietary foods containing nonnutritive sweeteners.

The tentative order also covers labeling provisions regarding nonnutritive sweeteners. The Commissioner intends to retain provisions on the labeling of nonnutritive sweeteners in food offered for weight control even if no safe nonnutritive sweeteners are available for use when the final order on this matter is issued. It is appropriate to have provisions on the labeling of nonnutritive sweeteners in case a safe nonnutritive sweetener for use in these foods becomes available. To avert possible confusion, the Commissioner has expressly indicated in the tentative order that a nonnutritive sweetener may be used in special dietary foods offered for weight control only if the use is safe and in accordance with the law and regulations. The Commissioner points out that there are other means besides the use of nonnutritive sweeteners through which foods can achieve a usefulness in weight control diets, e.g., reduction in fat content, use of natural juices or water as a packing medium.

13. In citing the record, the Commissioner has used the following system of abbreviations:

Tr.—For transcript pages of the hearing.
P.—For exhibits introduced by the Government, the proponent.
O.—For exhibits introduced by opponents.
WD-G—For written direct testimony by a witness for the Government.
WD-3A—For a written direct testimony by a witness for the designated opponent (e.g., "3A").
#—File number of submissions to the Hearing Examiner.
HEF—Hearing Examiner Finding.

14. In many instances, the findings of fact of the Hearing Examiner are relied on and adopted as the Commissioner's Proposed Findings of Fact. This is indicated by the parenthetical reference HEF, with the number of the Hearing Examiner's findings, at the end of the proposed finding. If the Commissioner has adopted a Hearing Examiner finding with changes, the finding is stated as being based on the Hearing Examiner finding.

Statement of Reasons

The Hearing Examiner's findings, adopted in the tentative order, are, in most instances, sufficient as a statement of reasons for the regulations in the tentative order. This statement gives a supplementary discussion of the need for the regulations, of the reasons for the changes made in the stayed regulations, and of the reasons for not accepting some contentions raised by participants in the hearing. The Commissioner has also discussed his specific reasons for not accepting findings of the Hearing Examiner, unless the reason for nonacceptance is evident from the discussion in this statement, or unless the finding was not relevant or necessary. The Commissioner has stated in parentheses after the Hearing Examiner's findings the reasons for not accepting particular findings when the reasons related to the specific finding, rather than major regulatory issues.

The Commissioner has not made an individual ruling on each finding of fact and conclusion of law proposed by participants to the Hearing Examiner. A considerable number of findings and conclusions were proposed and it served no useful purpose to discuss each separately. Some were incorporated by the Hearing Examiner into his findings. Some provided additional bases for support of conclusions adequately supported by other findings. Others were not accepted for reasons indicated in the findings or in this statement.

Need for Regulation

Obesity is a major health problem in the United States. Millions need to lose weight. Millions need to make a conscious adjustment in their eating habits to maintain their weight at a proper level. A major way to control weight is for individuals to limit their total daily intake of calories while still choosing foods that provide the full complement of required nutrients. Sustained weight loss is most likely achieved, not through crash dieting or monotonous diets, but through a moderate reduction in total caloric intake and a varied selection of usual foods. The Commissioner's aim in these regulations is to enable those who need to control their weight to identify and evaluate foods which may particularly help them attain and maintain their proper weight within a balanced and nutritious diet program.

Weight control problems can be helped if foods of special value are brought to the attention of purchasers. It is important that these regulations permit foods of special value to make appropriate claims. The labeling should be simple and conspicuous enough to reach the purchaser's attention. The labeling requirements should not be so burdensome that manufacturers forego making claims for foods which are of special value. It is equally important, however, that the labeling provide enough information for the purchaser to evaluate the usefulness of the food for regulating caloric intake and body weight.

The last major goal for these regulations is to prevent misleading labeling claims on foods that are not of value for special dietary use. These other claims should either not be made, or the claim should indicate clearly that the value of the food does not relate to weight control.

Foods of Special Value for Reducing or Maintaining Caloric Intake

Any food can be eaten by those on a diet, since the suitability of any one food depends upon the caloric and nutrition values of the other foods chosen by the consumer, but it would be inappropriate, on that account, to allow either all foods or no foods to claim special dietary value for weight control. Two types of food are appropriately considered to be of special value. The first type is food which is low in calories on an absolute basis. The second type is food which has been fabricated or altered to make it comparatively lower in calories than another similar or identical food for which it can substitute, e.g., reduced calorie food.

The use of a single low calorie, or comparatively lower calorie food, might very well not have dietary significance if it were the sole means used to reduce or maintain weight. People eat many foods in a day, however, and their efforts to control caloric intake should be based on their total diet and not a single item. Low calorie foods, reduced calorie foods, and other lower calorie substitutes are genuinely of special value when used with other measures to regulate caloric intake and body weight, including increased physical activity, and consumption of smaller portions.

General requirements. Paragraph (a) of § 105.66 of the tentative order contains the general requirements applicable to all foods that purport or are represented to be of special dietary usefulness for reducing or maintaining caloric intake or body weight. Section 101.3 (formerly § 1.8d) of the regulations governs the placement of the statement on labels if not otherwise provided for in these regulations.

One of the general requirements is that each food subject to 105.66 bear nutrition labeling in accordance with § 101.9 (formerly § 1.17), unless exempt under § 101.9. Even without this provision, the foods would be required to bear nutrition labeling since § 101.9 requires nutrition labeling on any food that bears any nutrition claim or information. Nonetheless, a requirement for nutrition labeling has been included in § 105.66 of the tentative order because it would avoid any possibility of confusion about the applicability of § 101.9, or oversight of it.

Section 125.5(a) of the stayed regulations required the label to bear information on the protein, fat, and available carbohydrate content of the food. The hearing record amply supports the need for labeling information about nutrition. The purchaser of special dietary foods particularly needs ready access to nutrition information because he has to be sure he gets all needed nutrients while reducing his caloric intake.

The Commissioner has not proposed to require the nutrition information provided for in the stayed regulation in addition to nutrition labeling in accordance with § 101.9. There is no need for two statements in differing formats; they could confuse consumers. The nutrition labeling provided for in § 101.9 will give the purchaser adequate nutrition information, and the uniform format it establishes for presenting nutrition information facilitates comparisons among foods.

Paragraph (a) of § 105.66 also requires foods offered for weight control to bear a statement indicating the importance of the total diet in weight control. This statement will bring this basic principle of weight control to the user's attention and clarify that the claim of usefulness by the food must be understood in relationship to the total diet.

Section 125.5(a) of the stayed regulations did not provide for this particular statement, but it did require foods to bear the statement "For calorie restricted diets." That statement served in part to direct the purchaser's attention to the importance of calories and the total diet, but the Commissioner believes that the new statement makes the point in a clearer way. The statement "For calorie restricted diets" also served to identify foods which purport to be useful for weight control. Identification is important, but the Commissioner believes that this can be adequately done through the labeling of the food in terms of the basis of the claim it makes, e.g., "Low Calorie." Accordingly, in the tentative order, the Commissioner has not required mandatory use of the statement "For calorie restricted diets."

Food fabricated or altered to lower caloric content. Foods which have been fabricated or altered to make them of special dietary usefulness for maintaining or reducing caloric intake or body weight would be required by § 105.66(b) of the tentative order to bear a statement describing the fabrication of alteration and the percentage by weight of any nonnutritive constituent used. This requirement has a purpose similar to that of the provisions in the stayed regulation requiring statements about the use of nonnutritive sweeteners or other nonnutritive constitutents and the percent by weight of any nonnutritive constituent. The percentage by weight of a nonnutritive sweetener did not have to be listed under the stayed regulation, and need not be listed under the regulation in this tentative order since the weight of nonnutritive sweeteners is ordinarily slight.

The Commissioner has not included labeling provisions specifically for sugar substitutes sold as such, even though the stayed regulation contained a provision on their labeling. He believes a specific provision is unnecessary in view of the general requirements applicable to all foods making caloric claims. The labels of any sugar substitutes will have to bear the statement required by § 105.66 about the manner of fabrication or alteration, and the additional requirements applicable to the claim of special dietary usefulness made by the food.

Low calorie foods. Section 105.66(c) of the tentative order sets forth the requirements for low calorie foods. The record indicated the need to establish a maximum number of calories in a food promoted as low calorie to ensure that foods have the value for dietary purposes they purport to have. The experts who testified generally agreed that there should be a maximum but disagreed on what the maximum should be, and on the bases upon which it should be set.

Section 125.5(f)(1) of the stayed regulations set a 15-calorie maximum per serving, and a 30-calorie maximum on a daily intake basis for a food labeled "low calorie." That calorie requirement rereceived "practically no support from any witness, Government or otherwise," to quote the Government Post-Hearing Evidentiary Memorandum, because it was "unrealistically low" and only a few foods would meet it (#588, p. 61). Government witnesses supported increasing the maximum to 25 calories per serving, and the Hearing Examiner found this maximum reasonable (HEF 486).

The Commissioner accepts the concept that the caloric designation should indicate foods of distinctly low calorie value in a single serving. The Government witnesses based the 25-calorie maximum on the concept that the low calorie designation should indicate both foods of distinctly low calorie value and foods that could be eaten at will without signicantly adding to the total daily caloric intake (HEF 483; WD–G–Levine, Q & A 130–133). Some low calorie foods may be so low in caloric value that they can be eaten freely, in as many servings as a person is likely to want, without adding significantly to the caloric content of the total diet, but the Commissioner has not limited the low calorie food designation to foods that can be eaten freely in numerous servings. Repeated servings of foods at the higher end of the low calorie range could make a significant contribution for some people. It is inevitably a matter of applying reasonable judgment, both by the Commissioner in establishing the requirements and by the consumer in consuming the food. Consummers will know from the caloric content given in nutrition labeling whether the low calorie foods may be consumed in numerous servings per day, or can only be consumed in a single serving or a few servings without adding significantly to the total caloric intake.

The Government's 25-calorie maximum was criticized on the basis that few foods would satisfy it, and particularly few fruits, vegetables, juices, and soups (e.g., Record cited in HEF 485, #576, Proposed Findings of Fact 105–124). The Commissioner has considered this objection carefully, and believes that the maximum caloric value for low calorie foods should be increased to 40 calories. The 40 calorie maximum would still include only foods of distinctly low caloric value and it would allow an increased number and variety of foods to be labeled. The Commissioner has analyzed the caloric values for foods included into the current edition of the U.S. Department of Agriculture Handbook No. 8 of which he takes official notice. The Commissioner recognizes that the determination of caloric values for foods varies depending upon the amount estimated as the serving size for different kinds of foods. Even allowing for some variations in estimates of serving sizes, the Commissioner finds that the 40 calorie per serving maximum includes a reasonable number of foods which should properly be recognized as "low calorie."

Some parties who criticize the Government's position advanced different concepts to be used in calculating the maximum for low calorie foods. These included basing the determination on typical foods recommended for use in diets, e.g., an ordinary hard boiled egg, or upon arithmetical portions of an appropirate diet, e.g., one-seventh of the calories in a low calorie meal (#576, Proposed Findings of Fact 90–92). These concepts have not been accepted. There is no convincing evidence that consumers would understand the low calorie designation in these ways. The concepts would allow foods containing a significant number of calories in a single serving to be labeled low calorie.

It was also argued that the low calorie term should be used to indicate foods which are lower in calories than similar foods in the same class, or foods used for a similar purpose, by, for example, distinguishing low calories vegetables from high calorie vegetables, or by encouraging the use of fruits in lieu of high calorie desserts (WD–53–Mayer, pp. 43–45, 57). To the extent this concept is valid, the 40 calories maximum promotes it in part. The Commissioner does not, however, accept this concept. Foods in the 60–75 calorie range provides substantial calorie, and use of the low calorie designation on such foods may lead to excess consumption of calories by consumers who associate the low calories designation with distinctly low caloric content. In addition, this concept is based on substituting a low calorie food for a number of different foods, all of which may vary in nutrition.

The Commissioner believes that the substitution of one food for another should be evaluated carefully in relationship to the nutrition value of the food. It would be difficult to determine nutritional equivalence with respect to the substitution of one food for various different foods, and to develop a labeling scheme that would convey to the purchaser clearly all the possible differences in nutritional values which should be considered in evaluating whether the substitution is appropriate. Accordingly, the Commissioner has not accepted the

concept that the low calorie designation should be used to encourage substitution of certain foods for various dissimilar foods.

The Commissioner has included a caloric density requirement of 0.4 calorie per gram for low calorie foods, in lieu of the provision in the stayed regulations which precluded low calorie claims by foods containing more than a specified number of calories in the average total daily intake. The daily intake provision served to prevent claims by foods based on the number of calories in an individual serving unit even though several units might be consumed at a time, e.g., a single cookie, a piece of candy or a single teaspoonful of sugar. These foods are not appropriate to consume at will. Caloric density distinguishes these inappropriate claims with greater precision. Because of the variability in serving sizes for these foods, statements of calories per serving are not adequately informative to aid consumers in evaluating whether these foods can usefully be included in a calorie-restricted diet. The importance of consideration of caloric density was presented in the testimony in the hearing (#576 at Proposed Findings of Fact 117–20, 122, 124, adopted as the Commissioner's Proposed Findings of Fact 61–66). This testimony indicated that most soups, juices, fruits and vegetables would meet the .4 caloric density requirement provided for in the regulation.

This testimony was introduced to support the position that the "low calorie" term should be permitted only on foods that are reduced to low calorie levels, and on soups, juices, fruits and vegetables that are low calorie as naturally constituted (#577, pp. 53–68). It was argued that foods that were not in these classes were inappropriate for use as low calorie foods. The Commissioner believes the caloric density requirement provides a better basis for distinguishing inappropriate low calorie claims than would a requirement that precludes claims by foods not in specified classes.

The tentative order adopts the requirement in the stayed regulation that foods claiming to be low calorie bear the identifying designation "low calorie" or variations of it and sets minimum standards for the type size to be used in the "low calorie" designation or variations of it to eliminate uncertainties about the degree of prominence to ensure that this important information reaches the consumer's attention. Under § 125.5 of the stayed regulations, this designation was required to appear on the label, and § 125.2 (now § 105.60) of the regulations stayed for the hearing also required statements to appear on the principal display panel. To eliminate any uncertainty about placement, and to ensure that consumers can readily identify foods offered as low calorie, the tentative order requires the statement to appear on the principal display panel.

Low calorie foods are of two types, those that are fabricated or altered to reduce calorie content to a low caloric level and those that are low in calories as ordinarily grown or made, e.g., celery. Both types may be labeled low calorie. Foods that are low calorie as ordinarily grown or made may not be labeled in a way that suggests they are lower in calories in comparison with identical foods. For example, if celery were labeled "low calorie celery" it would suggest that the labeled celery is lower in calories than other celery. These foods can make low calorie claims in other ways that do not have a misleading implication, e.g., "celery, a low calorie food" (Number 576, Proposed Finding of Fact 126).

"Reduced calorie" food and other comparative claims. Section 105.66(d) of the tentative order sets forth criteria for reduced calorie foods. Under § 125.5(g) of the stayed regulations, a food could make a comparative claim of usefulness in calorie regulation only if it had at least a 50 percent reduction as compared with another food. Many experts testified that it was appropriate to establish a minimum reduction figure, but that a 50 percent reduction requirement was unreasonable. The Hearing Examiner found a 50 percent minimum percentage reduction unreasonable, and proposed instead a 35 percent reduction as the minimum (HEF 481). The Commissioner accepts the Hearing Examiner's finding in essence, but has set the minimum reduction requirements slightly lower at 33⅓ percent. The 33⅓ percent figure can be expressed as a proportional reduction of one-third, a figure that is more familiar and understandable to the public.

The Commissioner believes the 33⅓ percent reduction requirement is more appropriate than the 50 percent requirement because he finds it to be more suitable for the moderate type of dieting program which is generally preferable for use by the general public. Diets with a moderate reduction are the most advisable for general uses, because they present less risk that intake of essential nutrients will be inadequate when the caloric intake is reduced. A 33⅓ percent reduction requirement allows a greater variety of nutritious foods to bear claims of usefulness in reducing or maintaining caloric intake or body weight, and variety is important in maintaining the motivation to adhere to a diet program.

Some witnesses at the hearing advocated an even lower caloric reduction requirement of 25 or 10 percent. The Commissioner believes that these figures would allow foods to bear claims that are not of significant help, and, by enlarging the number of foods that could make claims, it would be more difficult to make consumers aware of foods of particular use. This requirement may, however, in some instances preclude claims by foods for which it would be useful to have reduced calorie corollaries. The Commission has provided for a procedure, not found in the stayed regulations, through which foods not meeting the usual requirements will be allowed to bear claims of usefulness if the petitioner presents an appropriate scientific basis for his petition.

The Commissioner has also established a 25-calorie-reduction requirement per serving for foods that claim to be reduced calorie foods. This requirement will preclude claims by food such as spices, used in small amounts and containing a few calories, that may have a reduction that appears large in percentage terms but which is not significant. This requirement is in lieu of the provision in the stayed regulation limiting claims to foods of caloric importance, a requirement with a similar purpose but indefinite in its applicability. The Commissioner has not accepted the Hearing Examiner's finding 450 with respect to caloric importance for this reason. The regulations would also prohibit claims by foods which are reduced only in a comparison with a hypothetical food of the same type having more calories, even though no higher calorie food of that type had ever been sold.

Nutritionally inferior foods would not be permitted to make comparative claims of usefulness in weight control. The record clearly shows the importance of maintaining the intake of essential nutrients while calorie intake is being reduced. The stayed regulations did not expressly preclude claims by nutritionally inferior foods but the Commissioner believes it would be misleading to offer a food for special dietary use in a weight control diet if the food were less nutritious, apart from fat and calories, than the food it is represented as replacing in the diet.

The tentative order would also require all foods that claim to be reduced in calories to bear a statement describing the comparison on which the claim is based that gives the calorie content of the foods compared. The comparison statement may be made in the form of a comparison with a specific food, by its brand name or common or usual name, in the form in which it is customarily made and consumed. The comparison may also be made with the same food without the fabrication or alteration that gives the food its special dietary significance.

The stayed regulations permitted foods to make comparative claims either in relationship to the same food without a specified fabrication or alteration of special dietary significance, or in relationship to a specific food as customarily made and consumed. The Commissioner believes it is more useful if comparative claims are made with a specific food, e.g., "peaches packed in water, 38 calories per ½ cup serving, 62 percent less calories than Brand X peaches in heavy syrup" rather than in relationship to a general class of foods, e.g., "peaches packed in water, 38 calories per ½ cup serving, 62% less calories than if packed in heavy syrup." The tentative order allows the comparison to be made either way, however, since the determination of the amount of the reduction is easier when made in comparison with the same food without the fabrication or alteration. When the calorie comparison is made with a class of foods, the foods within the class may vary somewhat in calorie con-

tent making calorie computations more complex.

The calorie content comparison may be made by specifying either the number of calories in each food, or the number in one food and the percentage or proportional difference in calories in relationship to the other food. To be a comparison of caloric content, the statement must give the amount of calories in at least one of the foods compared. The statement must appear on the label, but need not appear on the principal display panel.

A food claiming usefulness in weight reduction or mantenance would have to be labeled "reduced calorie" if it meets the requirement of § 105.66(d) and is similar in taste and other organoleptic properties to the food specified on the labeling with which it is compared. A reduced calorie food need not be identical, apart from calories, to the food for which it substitutes, but it must be essentially the same as the other food in taste, appearance, and other organoleptic properties.

The stayed regulations did not expressly require all comparatively reduced calorie foods to bear common identifying terminology. Instead, separate labeling requirements were established in § 125.5 (b), (c), (d), (e), and (g) depending upon whether the food achieved its calorie reduction through use of artificial sweeteners nonnutritive ingredients, or some other means. A statement of general policy published in the FEDERAL REGISTER of July 6, 1966 (31 FR 9215) indicated that FDA was willing to consider "reduced in calories" as alternative terminology to "lower in calories." The Commissioner believes it will improve consumer understanding to provide common identifying terminology on foods that have the same organoleptic properties apart from a calorie reduction and has adopted the "reduced calorie" term for this purpose.

A food that is fabricated or altered to lower its calorie content but that does not have the same organoleptic properties as a specific food with which it is compared may not be labeled "reduced calorie" but may bear other labeling to indicate its special dietary usefulness. For example, canned pears packed in unsweetened water could not be labeled as reduced calorie because it does not resemble canned pears in syrup with respect to sweetness. It could bear a comparative claim on the label, though, comparing the calorie content of the pears in unsweetened water with pears in syrup. It could also bear other terms that represent or suggest special dietary usefulness, such as "for calorie restricted diets." The term "diet" could be used on the label to indicate the food's special dietary usefulness, but it could not be used in a way that suggests the food is similar in all its organoleptic properties to the food with which it is compared. Thus, the word "diet" could not be used immediately preceding the name of the food.

Label terms suggesting usefulness in regulating caloric intake or body weight. Section 105.66(e) of the tentative order would prohibit misleading terms in the labeling of foods which are not of special dietary usefulness for weight control. Thus, foods could not be labeled with terms that suggest the food is low calorie or lower in calorie than another food or other terms suggesting usefulness in regulating caloric intake unless it complies with § 105.66 (c) or (d) governing such claims. If anyone believes that it would be useful to consumers to allow these terms to be used on other foods, he may petition the Commissioner to amend the regulations to provide for such claims. If the claim is appropriate, the Commissioner can propose labeling that will enable the consumer to understand the basis of the claim being made and prevent confusion from various forms of making the claim.

Some foods have recently been offered as useful for weight control even though the foods are neither low calorie nor comparatively more reduced in calories than other food. The foods are offered as useful in conjunction with a total program for regulating the person's complete diet. Thus, an ordinary can of corn might be labeled as useful for weight control because of its inclusion in a total diet program. Claims of usefulness of this type were not prevalent at the time of the hearing, and the record does not provide an adequate basis for evaluating the usefulness of the foods in this type of program and the type of labeling that can be used on the foods without misleading consumers about the usefulness of the food and the fact that the foods are not reduced calorie or low calorie. The Commissioner will give careful attention to any adequately supported petition that seeks to provide for labeling of these foods for use in diets in a way that is not misleading.

Formulated meal replacements, low calorie meals, and other total meal replacements would not be subject to this provision pending the issuance of regulations governing these foods. Under the stayed regulation, claims for such foods had to be made on a comparative basis in relationship to a similar food or the same food without a fabrication or alteration of special dietary significance. Testimony was introduced that the validity of the claim should be determined on other bases, such as an absolute caloric standard for a low calorie meal (e.g., #576, Proposed Finding of Fact 88). The Commissioner proposed in the FEDERAL REGISTER of June 14, 1974 (39 FR 20905) a nutritional quality guideline for formulated meal replacements that would have required compliance with § 125.6 for such foods offered for use in a reduced calorie diet. The Commissioner has found the hearing record insufficient, however, to evaluate the suitability of other possible bases for making calorie claims for meal replacements and for low calorie meals. Accordingly, he proposes to exempt claims by formulated meal replacements and meal substitutes from § 125.6 at this time.

Use of terms such as "sugar free," "sugarless," "no sugar," etc. Purchasers associate statements about the absence of sugar with weight control claims and foods that are low calorie or have been altered to reduce calories significantly. The regulation does not prevent the "sugarless" statement from being used on foods that are not of special use in weight control diets, but it would require affirmative disclosures to prevent consumers from being misled about the usefulness of the food. Under § 105.66(f) of the tentative order, any food that makes a statement about the absence of sugar will have to bear a statement indicating the food is not low calorie or calorie reduced, unless the food is a low or reduced calorie food. Without the disclosure, some consumers might think the food was offered for weight control or was offered for both calorie control and another purpose.

Evidence was introduced at the hearing to show that the "sugarless" claim is useful to identify foods like chewing gum that are in sustained contact with the teeth in which use of a sweetener other than sucrose may help avoid tooth decay (WD–98–Schotenboer, pp. 7–8). The record is insufficient, in the Commissioner's judgment, to permit a conclusion that the use of certain sweeteners, such as sorbitol, is of dietary usefulness to help avoid tooth decay. He intends to examine this matter further to see if claims of usefulness in avoiding tooth decay based on the use of a sweetener other than sucrose are misleading. He agrees though, that the "sugarless" claim should be permitted to be used to indicate dietary uses other than usefulness for weight control if the use is not misleading and if the food bears appropriate labeling to prevent consumers from being misled about the other implications of the sugarless claim. The tentative order provides for suitable labeling of foods claiming to be sugarless.

Affirmative disclosures would not have been required under the stayed regulation, but the stayed regulation would not have allowed a food to bear a claim like "sugarless" that implies usefulness for weight control if the food were not a low calorie or comparatively reduced calorie food. Since this regulation would allow the "sugarless" term to be used on other foods, this creates the need to require additional disclosures to ensure that the term is not misleading to consumers.

Foods offered for weight gain. The Commissioner does not intend at this time to issue provisions on the particular label statements that must be borne by special dietary foods offered for use in gaining body weight. The stayed regulations required a food offered for this use to bear certain information about its nutrition content. Such foods have to provide the same information, in the form of nutrition labeling, by virtue of § 101.9 (formerly § 1.17), because of the inherent nutrition claim in any claim of usefulness in gaining body weight. In addition, under 21 CFR 105.60 (formerly 21 CFR 125.2), the food will have to bear an appropriate identification of the claim and its dietary basis. Thus, there no

longer is any need for the particular provisions in § 125.5(a) of the stayed regulations with respect to foods offered for weight gain, and these particular provisions are not included in this tentative order. If the Commissioner finds that additional label statements should be required on foods offered for use in gaining body weight, he will propose new regulations.

Foods useful in the diet of diabetics. Section 105.67 of the tentative order sets forth labeling requirements for food used in the diet of diabetics. Section 125.6 of the stayed regulations would have permitted foods to make claims of usefulness in the diet of diabetics. At the hearing, a Government witness testified that no such special labeling should be permitted because there are no unique characteristics of individual foods in the diet of diabetics, and because, in the event the diabetic needs to lose weight, the dietary needs of the diabetic for this purpose do not differ from those of other persons dieting to lose weight (WD–G–Moses, pp. 40–41). The Hearing Examiner rejected the proposal to delete labeling of foods for diabetics on the basis of his view that the diets of diabetics should be carbohydrate restricted and that for diabetics who are not overnight it might be desirable to reduce simple sugars in foods while maintaining customary total caloric intake (HEF 496, 498).

The Commissioner accepts the finding that the dietary components for diabetics for purposes of attaining optimal weight are essentially the same as for persons who do not have diabetes mellitus. The record is insufficient to establish, however, whether there may be foods with unique characteristics particularly suitable for inclusion in the diet of diabetics. The Commissioner recognizes, however, that some physicians believe there are foods of special value when used in the diet of diabetics under medical supervision. Some testimony was introduced at the hearing that some physicians recommend the use of foods containing mannitol or sorbitol by diabetics, but that the label of any food intended for use in the diet of diabetics should bear a statement that the food is for use only upon the advice, recommendation, or direction of their physician (#587, Proposed Finding of Fact 3). In view of this, the Commissioner has provided at this point in time for labeling of foods for use by dibetics upon the advice of a physician. The labeling must indicate prominently that the food is offered for use by diabetics only upon medical advice.

Evidence was introduced at the hearing which purported to show that the sugar alcohols, mannitol and sorbitol, would not be metabolized or would be metabolized slowly in ways that would not increase requirements for insulin, making them, it was urged, useful for diabetics, because use of these sugar alcohols would provide sweetened foods without requiring as much insulin as would the same foods made with sucrose or other similar sugars. The record indicated that the only sophisticated study of mannitol at that time was done solely on animals and that questions of data interpretation remained about that study (Ricketts Tr. 21008–09). Mannitol is currently subject to restricted use under an interim food additive regulation (21 CFR 180.25, formerly 21 CFR 121.4005).

A single study without positive controls was introduced in support of the concept that 40 grams or more of sorbitol per day may be useful to diabetics (Steinke Tr. 30553–66). The Commissioner believes that the record of this proceeding does not provide an adequate basis for reaching a conclusion on what claims are valid and have been adequately supported. Significant advances in knowledge and dietary management of diabetes mellitus have also occurred since the time of the 1968–1970 hearing upon which this proceeding is based.

If the Commissioner decides to propose regulations to define when claims of usefulness for diabetics are false or misleading, he will initiate a new proceeding. This will facilitate additional opportunity for public comment on a proposal, and allow the Commissioner to consider developments since the close of the hearing. The Commissioner also informs the public that he is initiating studies of the current state of knowledge of the dietary management of diabetes mellitus which will include a review of whether there are or are not foods with characteristics warranting label claims indicating particular usefulness in diets of diabetics.

Under the stayed regulations, foods labeled for use in the diet of diabetics would have had to bear a statement relating to the use of artifical sweeteners or nonnutritive ingredients. This requirement has been omitted from the tentative order. Such a statement might suggest incorrectly to diabetics that particular nonnutritive sweetereners or other nonnutritive ingredients are especially useful to diabetics. The labeling described in the tentative order will advise the diabetic to consult with his/her physician about the usefulness of the food. The statement of ingredients on the label will indicate the ingredients used and permit the physician and the diabetic to evaluate the usefulness of the food.

To ensure that consumers do not mistakenly think that all foods labeled for use by diabetics are necessarily low or reduced in calories, the labeling of foods that are not low or reduced in calories must bear an appropriate disclosure.

Foods that are useful in controlling body weight or caloric intake cannot, solely by virtue of that usefulness, be offered as special dietary moods useful in the diet of diabetics. Some diabetics need to lose weight, but the hearing record shows that their dietary needs in losing weight are the same as that of the general population.

Having considered the evidence pertaining to dietary management of body weight, caloric intake and diabetes received at the hearing, the Hearing Examiner's report and the various briefs, proposed findings of fact, and proposed conclusions of law with respect to §§ 125.5 and 125.6 of the stayed regulations sent to the Hearing Examiner in connection with testimony of this particular matter, the Commissioner, under the Federal Food, Drug, and Cosmetic Act (secs. 201 (n), 403 (a) and (j), 701 (a) and (e), 52 Stat. 1041 as amended, 1047–1048 as amended, 1055, 70 Stat. 919 as amended (21 U.S.C. 321(n), 343 (a) and (j), 371 (a) and (e))) and under authority delegated to him (21 CFR 5.1), the Commissioner proposes the following findings of fact, conclusions, and tentative order:

PROPOSED FINDINGS OF FACT RELEVANT TO § 125.5 (§ 105.66 OF TENTATIVE ORDER)

1. Obesity is a major public health problem in the United States today. The degree of health hazard is not necessarily proportional to the degree of obesity, and there can be significant health hazards of interference with body functions from relatively small amounts of obese overweight (WD–53–Mayer, pp. 26–27). (Based on HEF 427; the Commissioner has omitted a finding about whether obesity is increasing because it is not necessary and because current statistics have not been examined.)

2. The likelihood of successful reduction is in significant part a function of the prior duration of the obesity, and the longer the duration the less the likelihood of success. In treating obese patients, the object is to enable the patient to moderate his intake for the rest of his life and it is advisable to modify, in the main, the quantity of foods to which he is habituated (WD–53–Mayer, pp. 16–17, 26–27; Stare, Tr. 29220; WD–G–Levine, Q & A 37; (HEF 428)).

3. Obesity is caused by an excess of caloric intake over caloric expenditure in the same time period (WD–53–Mayer, pp. 15–16; WD–3A–Sebrell, p. 22; WD–G–Ricketts, p. 3; WD–G–Levine, Q & A 33–34; WD–76–Stare, Q & A 11–13; (HEF 429)).

4. Obesity can be psychologically damaging, particularly to adolescents, even if subsequently reduced. Obese persons frequently regain lost weight (WD–53–Mayer, pp. 14–15, 17–20; Ricketts, Tr. 20795; Levine, Tr. 22371). (Based on HEF–430; the Commissioner has omitted a finding about the exact percentage of obese children who become obese adults because it is not necessary and he is uncertain about the precise percentage.)

5. Regaining of lost weight may be dangerous to health, and is particularly discouraging to patients and therapists. Prevention of further obesity is as important to public health in the United States as reduction of already-existing obesity (WD–53–Mayer, pp. 16, 21; Levine, Tr. 22371–72, 22400; Ricketts, Tr. 0740, 20795; WD–49–Hirsch, p. 4; Darby, Tr. 26303; Stare, Tr. 29225; (HEF 431)).

6. A food may be of value for special dietary use by reason of its value in preventing obesity. A food may be of value for special dietary use by reason of its value in maintenance of reduced body weight. A food may be of value for

special dietary use by reason of its value in reducing excess weight[1] (WD–52–Mayer, pp. 34–35; Darby, Tr. 26293–94; (HEF 432)).

7. Body weight can be reduced by restricting total caloric intake and, if possible, increasing physical activity. Body weight can be raised by increasing caloric intake (WD–G–Ricketts, Q & A 15–16, 18; WD–G–Levine, Q & A 36; WD–76–Stare, Q & A 16; (HEF 443)).

8. A pound of weight (due to fat) in human beings is produced by approximately 3500 calories in excess of expenditure in a given time period, and a deficit of this amount in a given time period will reduce 1 pound of weight due to fat (WD–53–Mayer, p. 15). (Based on HEF 435; the Commissioner has accepted the Hearing Examiner's finding with the addition of the bracketed term.)

9. The goals of prevention of weight gain, maintenance of reduced weight, and reduction of weight, for large groups of people, are compatible with each other in that a balanced diet with moderate caloric reduction is the optimum route to each of these three goals since, as stated in the Final Report to the President of the White House Conference on Food, Nutrition and Health by the "Subpanel on Obesity" of the "Panel on Adults in an Affluent Society: The Degenerative Diseases of Middle Age:" "It is clear that that best and most effective results occur with a balanced diet of the usually available foodstuffs but with a decrease in total caloric intake of a type that can be used both for weight reduction and for the maintenance of lower body weight after reduction has been achieved" (WD–53–Mayer, pp. 29–30, 22–24, 41–42; WD–49–Hirsch, 26A p. 14, Tr. 30,331; Darby, Tr. 26,294; WD–3A–Sebrell, pp. 22–23, Tr. 26,150; Exhibit 0–695–53).

10. Sorbitol and mannitol are sugar alcohols. Sorbitol is readily metabolized into fructose and thereafter forms part of a general pool with protein, fats, vitamins and other substances from which pool the body may produce glucose as needed. When this glucose is released into the blood, insulin may be required. Sorbitol produces approximately 4 kcal (kilocalorie) per gram. Mannitol is variable in its caloric value. Like sorbitol, mannitol, after it is initially metabolized enters the general pool from which glucose is derived by the body (WD–G–Levine, Q & A 25–27, 80, 191; WD–G–Ricketts, Q & A 37–38; Bondy, Tr. 30060, 30062; Steinke, Tr. 30563–5; WD–49–Shuman, p. 10; (HEF 436)).

11. "Artificial sweetener" is a sweetening substance not used in normal metabolism as a source of calories (WD–G–Levine, Q & A 81; (HEF 437)).

12. The most common use of artificial sweeteners in foods is for the purpose of reducing or maintaining the body weight and in the diets of diabetics (WD–G–Moses, Q & A 21; (HEF 438)).

[1] The Commissioner has deleted the term "obese overweight" whenever it appeared in the Hearing Examiner's findings because the term is redundant, and he has substituted the correct term "excess weight."

13. Purchasers regard foods labeled as being artificially sweetened to be for caloric restriction and weight reduction (WD–G–Swanson, Q & A 22–24; (HEF 439)).

LABEL INFORMATION

14. Purchasers in the United States are aware of the relationship between their body weight and the foods they eat. Purchasers in the United States are highly responsive to the labeling, promotion, and advertising of foods (WD–G–Swanson, Q & A 15–17; (HEF 440)).

15. The FDA survey reports the following: 53 percent of the respondents have used products labeled "artifically sweetened"; 27 percent, "dietetic"; 45 percent, "low calorie"; 36 percent, "lower in calories"; 35 percent, "sugar free"; 10 percent, "diabetic"; 16 percent, "salt restricted". (Exh. P–1151, d–1, Q 43; (HEF 441)).

16. The FDA survey reports the following: Of those who used the products labeled as described in the preceding finding, 55 percent used the products labeled "artificially sweetened" on their own initiative; 25 percent did so with products labeled "dietetic"; 45 percent, "low calorie"; 36 percent, "lower in calories"; 33 percent, "sugar free"; 4 percent, "diabetic"; 5 percent, "salt restricted" (Exh. P–1151, d–1151, d–2, Q 44; (HEF 442)).

17. The FDA survey reported the following: 66 percent of the respondents understood that a food with the label statement "for calorie restricted diets" was intended for use in a reducing diet and 8 percent for use in a diabetic diet; 22 percent understood the label statement "dietetic" as intended for people on a reducing diet and 28 percent for people on a diabetic diet; 36 percent understood the label statement "diet" to mean that the food was of value in a weight reducing diet and 9 percent as intended for use by diabetics (Exh. P–1151, d–5, Q 50–52; (HEF 444)).

18. The great variety of labels, labeling, promotional material, and advertising for foods offered for special dietary uses because of their reduced caloric or carbohydrate content in the United States tends to confuse and mislead (WD–G–Ricketts, Q & A 73–80; WD–G–Iverson, Q & A 30–38, 42–47, 52–61, 63 (HEF 445)).

19. There is no uniformity to the labeling information or the descriptive phrases used to indicate that a food is of value in a calorie or carbohydrate restricted diet (WD–G–Moses, pp. 39–40, 50–128 (HEF 446)).

20. The label statement "low calorie" appears on the following labels: Exhs. P–794, P–800–802, P–807, P–809, P–812, P–814, P–829, P–832, P–837–844, P–856, P–872, P–916, P–918–920, P–930–934, P–936–943, P–945–949, P–955–957, P–960, P–962–964, P–972, P–975, P–991, P–993, P–1003, P–1009; WD–G–Moses, pp. 50–51; "lower in calories", Exhs. P–774, P–776, P–777, P–906, P–929, P–971, P–990; WD–G–Moses, p. 63; "low in carbohydrate", "no available carbohydrate", "starch free", P–1038–39, P–803, P–805, P–806, P–815, P–850, P–851, P–854, P–955, P–965, P–985, P–987, P–1018; WD–G–Moses, p. 71; representations that sugar was absent, such as, "for sugar restricted diets", "sugarless", "sugar free", no added sugar", "prepared without sugar", Exhs. P–773–774, P–776, P–778, P–779, P–780–781, P–783–798, P–804, P–816, P–818–820, P–824, P–828, P–834–837, P–839–842, P–844, P–846–847, P–849–855, P–857–868, P–870, P–883–884, P–906, P–908, P–917–918, P–920–930, P–947, P–949–950, P–954, P–959, P–972–974, P–983, P–987–988, P–992, P–1015, P–1017–1018; WD–G–Moses, pp. 84–85; "low fat', "lower in fat", Exhs. P–692, P–898, P–966, P–968–969, P–971–972, P–1002, P–1017; WD–G–Moses, pp. 92–93; "dietetic", Exhs. P–771–772, P–777–790, P–794–797, P–803, P–805–806, P–808, P–811, P–813, P–815, P–817–818, P–823, P–825, P–834–835, P–842, P–845, P–847, P–849–854, P–857–862, P–870, P–888, P–897, P–906, P–916–917, P–919–920, P–922, P–924–928, P–954, P–974, P–983, P–987; WD–G–Moses, pp. 101–102; "diet", Exhs. P–767–768, P–823, P–827, P–846, P–895, P–898, P–909–915, P–929–930, P–932, P–935–936, P–939–940, P–949, P–959–960, P–982, P–992, P–995–996, P–998; WD–G–Moses, p. 102; "artificially sweetened", Exhs. P–775–776, P–807, P–809–810, P–812, P–814, P–816–817, P–819–822, P–824, P–827–828, P–830, P–833–841, P–843–844, P–847, P–855–856, P–866–867, P–872, P–932, P–934–936, P–939, P–946–950, P–955–957, P–959–964, P–972–974, P–988, P–1003, P–1015, P–1017–1021; WD–G–Moses, p. 125; "diabetic", "diabetes", "for diabetics", Exhs. P–816, P–819–822, P–826, P–873–881, P–883–888, P–894, P–1017; WD–G–Moses, p. 147; "special formula" bread etc., Exhs. P–896, P–901–902, P–997, P–999–1001, P–1012; WD–G–Moses, p. 114; (HEF 447)).

21. The great variety and multiplicity of label designations for foods offered for special dietary use because of their reduced caloric or carbohydrate content has an adverse effect upon the purchasers' understanding of those products and the potential for misunderstanding and error in perception increases as the number of such designations increases with respect to the ability of the purchaser to intelligently choose among such foods (WD–G–Swanson, Q & A 19 (HEF 448)).

22. As of 1970, the different methods used on the various labels, to express the amounts of protein, fat, and available carbohydrates present in the product, were in terms which were difficult to understand (WD–G–Moses, Q & A 34–37; WD–G–Iverson, Q & A 66, Exhs. P–640, P–641, P–647, P–688, P–767–847, P–849–868, P–870–1021, P–1035–1039, P–1042–1044, P–1090–1102, P–1104–1111). (Based on HEF 449; the Commissioner accepts the Hearing Examiner's findings as of 1970 because the subsequent institution of a requirement for nutrition labeling alleviated these difficulties.)

23. As of 1970, relatively few labels of foods offered as reduced in calories or carbohydrates provide information whereby the reduction in calories or carbohydrates can be measured or evaluated by purchasers. Frequently, when both nutritive and nonnutritive sweeten-

ers are used in a food for special dietary use, the presence of the nutritive sweeteners and the proportion of the food which is comprised of nutritive substances is not made apparent (WD-G-Moses, Q & A 34-37, 56, 219-221; Exhs. P-640, P-641, P-647, P-688, P-690-698, P-767-847, P-849-869, P-870-1021, P-1035-1039, P-1042-1044, P-1090-1102, P-1104-1111; WD-G-Moses, pp. 131-134). (Based on HEF 455; the Commissioner accepts the Hearing Examiner's finding as of 1970 because the subsequent institution of a requirement for nutrition labeling alleviated these difficulties.)

24. Regulations of the Food and Drug Administration in effect in 1970 with respect to foods offered for the reduction or maintenance of body weight do not require label information sufficient to inform as to the number of calories that will be obtained through ingestion of an ordinary serving of the food (WD-53-Mayer, pp. 46-48; WD-G-Iversen, p. 18). (Based on HEF 456; the Commissioner accepts the Hearing Examiner's finding as of 1970 because the subsequent institution of a requirement for nutrition labeling alleviated these difficulties.)

25. Regulations of the Food and Drug Administration presently in effect governing foods offered for weight reduction or maintenance do not require label information which fully informs consumers as to the value of the food for special dietary use in that the regulations do not require the label to compare the number of calories contained in a reduced calorie food with the number of calories in the same food as ordinarily consumed (WD-G-Moses, pp. 31, 32; WD-53-Mayer, p. 48; WD-G-Levine, pp. 18-19, 25-26; WD-G-Ricketts, p. 10; (HEF 457)).

26. It is necessary to make an intelligent evaluation of the value of a food offered for special dietary use to increase, reduce or maintain body weight, or for the diets of diabetics, to know the amount of protein, fat, carbohydrates and calories contained in a serving of the food (WD-G-Levine, Q & A 28-32, 65, 68, 70; WD-G-Ricketts, Q & A 21-24, 26, 27, 97; WD-G-Ross, Q & A 69; WD-G-Iverson, Q & A 65, 66; (HEF 458)).

27. Amounts of protein, fat, and available carbohydrates are customarily expressed in grams (WD-G-Ricketts, Q & A 30; WD-G-Livine, Q & A 71; (HEF 459)).

28. Caloric content, in order fully to inform consumers, should be expressed in terms of an amount which constitutes an ordinary serving of the food (WD-G-Moses, pp. 19-20; WD-53-Mayer, pp. 46-48; WD-G-Levine, Q & A 73, 74; WD-G-Swanson, Q & A 49; WD-G-Ricketts, Q & A 31-33; WD-G-Ross, Q & A 69-71; WD-G-Iverson, Q & A 65, 66; (HEF 460)).

29. The phrase "for calorie restricted diets" is not necessary in order fully to inform consumers of the value of a food which purports to be or is represented as being for special dietary use by reason of being low or lower in calories (Mayer, Tr. 28, 912-913; Swanson, Tr. 22,905-906; WD-49-Hirsch, p. 20, Tr. 30, 302).

LABEL INFORMATION ON FABRICATION OR ALTERATION TO LOWER CALORIE CONTENT

30. Artificial sweeteners used to sweeten foods may be nutritive, nonnutritive or a combination of these. A diabetic or a person seeking to reduce or maintain his body weight must know the nature of the sweeteners used in the food to properly plan a diet. It is necessary that some designation such as "artificially sweetened" be used on the food's label to call attention to the presence of such sweeteners and is the artificial sweetener is nutritive or nonnutritive this fact should be displayed. If the name of the artificial sweetener is used on the label, it is necessary and appropriate that the fact that it is nonnutritive be stated (WD-G-Levine, Q & A 87; WD-G-Ricketts, Q & A 40, 46, 58-60; WD-G-Ross, Q & A 79-82; (HEF 463)).

31. It will further the purpose of fully informing the purchaser as to the value of a food offered for special dietary use in which an artificial sweetener has been used to require that the label carry a statement comparing the caloric content of a specified serving of such food with an equivalent serving of the same food made with an amount of ordinary sugar which would produce sweetness equal to that produced by the use of the artificial sweetener (WD-G-Ricketts, Q & A 47, 28; WD-G-Levine, Q & A 90, 91). (HEF 467; the Commissioner does not accept this finding insofar as it relates to the labeling of low calorie foods.)

32. One gram of saccharin or of a saccharin salt is equivalent in sweetness to 300 grams of sugar (WD-G-Blomquist, Q & A 6-11; (HEF 468)).

33. Sweetness is an important component of palatability. Nonnutritive sweeteners provide the sensation of sweetness without adding calories (WD-53-Mayer, pp. 43-44; Sebrell, TR. 26147; WD-G-Levine, pp. 9, 17, Tr. 22337; WD-G-Ricketts, p. 7; Iversen, TR. 21844-45; (HEF 469)).

34. Food constituents, other than artificial sweetners, which are not utilized in normal metabolism as a source of calories, are also useful as ingredients in foods for special dietary uses (WD-G-Ricketts, Q & A 61; WD-G-Ross, Q & A 87; (HEF 487)).

35. Such constituents include fibrous plant matter, commonly called "crude fiber." This material is not assimilated by the body (WD-G-Ricketts, Q & A 62-64; WD-G-Levine, Q & A 113-119; (HEF 488)).

36. Where a food that contains one or more of such constituents is offered for special dietary use for reduction or maintenance of body weight or the regulation of carbohydrate intake, it is necessary for the purpose of fully informing purchasers as to the value of the food, that the label state the percent by weight of such ingredient and whether they are nutritive or nonnutritive. The label should also bear a statement of comparison between the calorie content of a specified serving of such food and an equivalent serving of the same food which does not contain such constituents, or with a food without the fabrication or alteration (WD-G-Ricketts, Q & A 65; WD-G-Levine, Q & A 121-122, 127; WD-G-Ross, Q & A 88). (Based on HEF 489; the Commissioner has accepted the finding with the addition of the final clause in the last sentence in order to take account of the alternative means of making the comparison permitted under the stayed regulations and the regulation in the tentative order. In addition, he has not accepted the finding that labeling about nonnutritive constituents is necessary in order to inform persons with intestinal disorders; the listing of the constituent in the statement of ingredients would generally be adequate for this purpose, and it would not be necessary solely for this purpose to require an additional label statement about the presence of nonnutritive constituents.)

REDUCED CALORIE FOODS

37. Many foods offered for special dietary use on the basis that they have been reduced in calories or carbohydrates are not significantly different from the unaltered food (WD-G-Levine, Q & A 93-98, 136, 222; (HEF 451)).

38. Some foods, reduced in calories or carbohydrates, are not ordinarily eaten in large enough amounts to have an appreciable value in the diet although the reductions are high on a percentage basis (WD-G-Levine, Q & A 159-163, 227; (HEF 453)).

39. Condiments and seasonings are not of caloric importance in the diet. They are consumed in small amounts. Caloric or carbohydrate reduction in such foods would have little effect in the diet of persons who desire to restrict their calorie or carbohydrate intake. Even if the percentage of reduction is high, it is not scientifically reasonable to describe such foods as "low calorie" foods (WD-G-Levine, Q & A 159-163; WD-G-Ross, 96; WD-G-Ricketts, Q & A 72; (HEF 466)).

40. Artificial sweeteners, both nutritive and nonnutritive, can be useful in diets designed for the restriction of caloric intake and if promoted on this basis the caloric reduction resulting from the use of the artificial sweetener should be significantly large (WD-G-Ricketts, Q & A 34, 35, 49, 50; (HEF 470)).

41. The caloric significance of a given caloric reduction in a food is not affected by the manner in which the reduction is achieved. Where a food for special dietary use is promoted on the basis of a reduction in its caloric content by a means other than the use of nonnutritive sweeteners, the reduction should be significantly large (WD-G-Ricketts, Q & A 49, 50; WD-G-Levine, Q & A 128, 129, 164; WD-G-Ross, Q & A 91; WD-G-Iversen, Q & A 68; (HEF 471)).

42. The nutritional significance of a given caloric reduction in a food may be adverse depending upon the manner in which the caloric reduction was achieved, for example, where the caloric reduction results in elimination of protein, vitamins or minerals (WD-49-Hirsch, pp. 10-11).

43. A 50-percent reduction requirement would require some foods which are good sources of protein, such as dairy prod-

ucts, to reduce not only fat and carbohydrate content but protein content as well (WD–49–Howard, pp. 18–20) (Based on HEF 474; the Commissioner has limited the finding to "some" foods, since he does not believe it would be correct with respect to all foods.)

44. Significantly more foods can achieve a caloric reduction below 50 percent, and a 50-percent requirement is not consistent with the goal of a moderate reduction in as many foods as possible (WD–53–Mayer, pp. 50–51; Mayer, Tr. 28,806; WD–49 Hirsch, p. 16; WD–3A–Sebrell, p. 23). (Based on HEF 475; the Commissioner has not accepted the part of findings with respect to a 25-percent reduction for the reasons given in the Statement of Reasons.)

45. The size of the caloric reduction in a food for special dietary use, whether produced by the use of a nonnutritive artificial sweetener or by some other means, which would justify promotion on the basis of the reduction achieved was the subject of sharp disagreement among the expert witnesses who spoke to the matter (HEF 476).

46. Dr. Ricketts stated: "And I stated several times before that the figure of 50 percent was *an approximate one, an arbitrary one, and that I had no strong feelings about keeping it there* or making it 60 percent or 40 percent. And I suppose I could not quibble very hard about 35 percent" (emphasis added) (Tr. 20826; (HEF 477))

47. Dr. Levine stated: "When it comes to the selection of 50 percent, sure, everything has to be, in a sense *arbitrary*. But let us say you have a 100-calorie portion of something. If this is going to be really useful for reduction of weight it should be *around* 50 calories for the same serving, because there are certain foods that will never be reduced in caloric content" (emphasis added) Tr. 22212. And at Tr. 22275–76, he stated that he would consider an approximate reduction of 40 percent in the caloric value of pudding to be significant (HEF 478).

48. There was no more agreement on a single percentage figure among the expert witnesses who testified on behalf of the opponents whose estimates ranged from 10 percent, WD–49–Eisenstein, p. 16, Tr. 29419; to 25 percent, WD–49–Graham, p. 16; WD–49–Hirsch, p. 18; WD–3A–Darby, p. 6; WD–53–Mayer, p. 49, Tr. 28796; to from 25 to 30 percent, Stare, Tr. 29197–98; to 33 percent, WD–49–Olson, p. 21; (HEF 479).

49. A 50-percent minimum requirement may operate to encourage the use of "fillers" in situations where products narrowly fall short of meeting the percentage (WD–49–Hirsch, p. 15; (HEF 480)).

50. The Hearing Examiner stated: "It appears that the selection of a minimum percentage figure of reduction in caloric value as "significant" for the purpose of justifying the promotion of a food for special dietary use on the basis of such reduction, is necessarily tinged with some arbitrariness. Under the circumstances and in the light of the evidence, I am persuaded to suggest that the figure of 35 percent is reasonable, workable and most equitable * * *." (Based on HEF 481; the Commissioner has not accepted the part of the findings with respect to the diet of diabetics for the reasons given in the Statement of Reasons.)

51. Where a food for special dietary use is promoted on the basis that it is "lower in calories," it is reasonable and necessary to fully inform a purchaser as to the value of the food that the label bear a statement of comparison showing the caloric content of a specified serving of the food and the caloric content of an equivalent serving of a similar food as customarily made and consumed (WD–G–Ricketts, Q & A 67; WD–G–Levine, Q & A 155, 156; WD–G–Ross, Q & A 90; (HEF 482)).

LOW CALORIE FOODS

52. In spite of the wide usage of the term "low in calories" in the labeling of foods for special dietary use in reducing or maintaining body weight, there is no common standard to determine when a food is "low in calories" (WD–G–Moses, Q & A 60, 62, 75–89; WD–G–Iversen, Q & A 67; e.g., 81–140 calories per serving, Exhs. P–1031–1034; 40–130 calories per serving, Exhs. P–801, P–807, P–812, P–814, P–856, P–940, P–941, P–943, P–945, P–946, P–947, P–949, P–956, P–972, P–991, P–1003, P–1009; (HEF 454)).

53. A food for special dietary use which is promoted on the basis that it is a "low calorie" food should, in order to fully inform a purchaser as to its value, be required to meet a caloric standard designating a food as a "low calorie" food (WD–G–Levine, Q & A 142–145; WD–G–Ricketts, Q & A 81; (HEF 483)).

54. The dispute concerning the standard for "low calorie" was less sharp than that involving the significance of caloric reduction. Drs. Ricketts, Levine, and Ross stated that a serving of such a food should not exceed 15 to 25 calories and that the total contribution to a day's diet should not exceed 50 calories (WD–G–Ricketts, Q & A 81, 82; WD–G–Levine, Q & A 139, 140; WD–GRoss, Q & A 89; (HEF 484)).

55. Dr. Mayer was of the opinion that the definition should include foods ranging from 25 to 75 calories (WD–53–Mayer, 54–55; (HEF 485)).

56. The Hearing Examiner stated "As in 'significant reduction' fixing a standard for qualification of a food as 'low calorie' is more or less arbitrary in nature. In view of the evidence it is suggested that a fair figure would be not more than 25 kcalories per serving with a daily ceiling of 65 calories." (Based on HEF 486; the Commissioner has not accepted the part of the findings relating to the particular figure that should be set for the reasons given in the Statement of Reasons.)

57. Caloric density, that is, the ratio of calories to weight, varies among foods (P–719).

58. Government and opponent witnesses indicated that caloric density should be considered in determining the special dietary value of a food as a low calorie food (Darby, Tr. 26,305, 26,309, 26,313; WD–G–Ricketts, p. 15; Levine, Tr. 22,–353–54, 22,239).

59. The ratio of calories to gram of sugar is approximately 4:1, that is, four calories to a gram (P–719, p. 73).

60. Sugar, as pure carbohydrate, is a calorically dense food (Levine, 22,353–54, 22,239).

61. Those soups, juices, fruits, and vegetables which contain less than 65 calories in an ordinary serving contain a ratio of calories to grams of from 1:2 to 1:20, that is, one-half to one-twentieth of a calorie per gram, and most contain one-third to one-sixth of a calorie per gram (P–719, pp. 66–69, 47–49, 39–46, 77–86).

62. Soups, juices, fruits, and vegetables containing less than 65 calories in an ordinary serving are from one-eighth to one-eightieth as calorically dense as sugar, and most are from one-twelfth to one-twenty-fourth as calorically dense as sugar.

63. The caloric densities of soups, juices, fruits, and vegetables are among the lowest of all foods eaten in the United States (P–719).

64. There is no justifiable reason for restricting the term "low calorie" on the basis of average total daily intake of the food since the overall nutritional contribution of the food must be considered in dietary planning (WD–3A–Darby, p. 6).

PROPOSED FINDINGS OF FACT RELEVANT TO § 125.6 (§ 105.67 OF TENTATIVE ORDER)

65. There were approximately 2.3 million "diabetics" in the United States in 1970. The median ages were 60.2 years for males and 61.8 years for females. Two-thirds of all diabetics were over 55 years of age. Diabetics who were under age 25 comprised 5 percent of the total. Undetected cases of this disease may have amounted to approximately 2 percent of the population in addition. Persons suffering from diabetes mellitus are known as "diabetics" (Exh. P–1082, pp. 3–4; WD–G–Levine, Q & A 171). (Based on HEF 490; the Commissioner accepts the statistical findings as valid as at the time of the hearing.)

66. There are no regulations presently having specific reference to foods for use in the diets of diabetics (WD–G–Moses, Q & A 72, p. 39 (HEF 491)).

67. The stayed regulations, which are the subject of the public hearing herein, published in December 1966; H.E. Exh. No. 3, includes § 125.6 (a), (b), (c), and (d) which regulates label statements for foods represented for the special dietary use of diabetics (HEF 492).

68. On June 6, 1969 during the course of the public hearing, the Chief of the Food Case Branch, Division of Case Guidance, Bureau of Regulatory Compliance of the FDA offered testimony suggesting the elimination of stayed § 125.6 (WD–G–Moses, p. 41; (HEF 493)).

69. Such elimination was suggested because "at the time stayed § 125.6 was drafted, I though it might be advisable to require a clear and direct declaration

when a food was intended for use in diabetic diets, since this might be less likely to mislead consumers than the many indefinite descriptive terms now being used on such foods. Since that time, however, further experience has caused me to reconsider—I am informed that usually the diet of diabetics must be restricted in calories as well as in readily assimilated sugar and carbohydrates. The information needed by diabetics to control their intake of calories is required by stayed § 125.5. I therefore do not believe stayed § 125.6 is necessary" (WD–G–Moses, pp. 40–41; (HEF 494)).

70. The diets recommended for diabetics are not identical to diets recommended for weight reduction or weight control (WD–49–Shuman, p. 2; WD–49–Graham, p. 13; WD–49–Marble, p. 2; WD–98–Bondy, p. 3; Steinke, Tr. 30551; WD–G–Ricketts, Q & A 87; WD–G–Levine, Q & A 187; WD–G–Ross, Q & A 80–82; (HEF 495)).

71. The carbohydrate intake recommended for diabetics depends on many factors, including the ratio of fat to protein in the food consumed. Caloric reduction per se has greater significance in diets for weight reduction or weight control than in the diets of diabetics. Many persons with diabetes are of normal weight, or even underweight, and do not need low calorie diets. If a diabetic is not overweight, his diet is not the same as that of an overweight person (WD–49–Kagan, p. 22, Tr. 30611; WD–49–Shuman, p. 2; WD–49–Marble, p. 2; WD–49–Hirsch, p. 23; Steinke, Tr. 30554–55). (Based on HEF 496; the Commissioner has not accepted the part of the findings relating to the nature of the dietary needs of diabetics for the reasons given in the Statement of Reasons.)

72. Diabetics are sophisticated in their choice of foods and the label statement "for the diets of diabetics" as the means of identification of foods intended for such use would be beneficial and assist in fully informing such purchasers as to the value of the foods (Bondy, Tr. 30073–74; WD–49–Gitter, p. 22; Steinke, Tr. 30555–56; (HEF 497)).

PROPOSED CONCLUSIONS OF LAW

A. With respect to § 105.66 Label statements relating to usefulness in maintaining or reducing caloric intake or body weight:

The Commissioner concludes, based on the foregoing statement of reasons, in conjunction with the findings of fact herein published, that:

1. It is reasonable and necessary, to fully inform purchasers of the value of foods for special dietary uses, to require that the labels of any food that purports to be or is represented as useful in maintaining or reducing caloric intake or body weight bear label statements as required by § 105.66 as set forth in the tentative order.

2. It is reasonable and necessary to prevent purchasers of special dietary foods for use in maintaining or reducing caloric intake or body weight from being misled about foods which are not of special dietary usefulness for such purpose to restrict the use of label statements, and/or to require certain disclosures on foods that are not of such special dietary usefulness as required by § 105.66 as set forth in the tentative order.

B. With respect to § 105.67 Label statements relating to food for use in the diet of diabetics:

The Commissioner concludes, based on the foregoing statement of reasons, in conjunction with the findings of fact herein published, that:

1. It is reasonable and necessary, to fully inform purchasers of the value of foods for special dietary uses, to require that the labels of any food that purports to be or is represented for use in the diet of diabetics bear the label statements as required by § 105.67 as set forth in the tentative order.

2. It is reasonable and necessary to prevent purchasers of special dietary foods for use in the diet of diabetics from being misled about foods thhat are not of special dietary usefulness for such purpose to restrict the use of label statements as required by § 105.67 as set forth in the tentative order.

TENTATIVE ORDER

Therefore, on the basis of the foregoing statement of reasons, findings of fact, and conclusions of law drawn therefrom: *It is ordered*, That the stay of the effective date of §§ 125.5 and 125.6 (now 105.67) as promulgated in the FEDERAL REGISTER of December 14, 1966 (31 FR 15730) be ended and redesignated as §§ 105.66 and 105.67, respectively, and revised to read as follows:

§ 105.66 Label statements relating to usefulness in reducing or maintaining caloric intake or body weight.

(a) *General requirements.* Any food that purports to be or is represented for special dietary use because of usefulness in maintaining or reducing caloric intake or body weight, including, but not limited to any food which bears representations that it is low or reduced in calories, shall bear:

(1) Nutrition labeling in conformity with § 101.9 of this chapter, unless exempt under that section; and

(2) On its label the statement "Weight control by diet requires limiting total intake of calories."

(b) *Food fabricated or altered to lower caloric content.* (1) Any food subject to paragraph (a) of this section which has been fabricated or altered to lower its caloric content (e.g., "low calorie" food made by replacing a nutritive ingredient with a nonnutritive ingredient, a "reduced calorie" food made by adding a nonnutritive filler) shall bear on its principal display panel a clear and concise statement of how the special dietary usefulness has been achieved, and the percentage by weight of any nonnutritive ingredient used to achieve the special dietary usefulness.

(2) A special dietary food may contain a nonnutritive sweetener or other ingredient only if the ingredient is safe for use in the food under the applicable law and regulations of this chapter. Any food which achieves its special dietary usefulness in reducing or maintaining caloric intake or body weight through the use of a nonnutritive sweetener shall bear on its principal display panel the statement required by paragraph (b)(1) of this section, but need not state the percentage by weight of the nonnutritive sweetener. If a nutritive sweetener(s) as well as a nonnutritive sweetener(s) is added, the statement shall indicate the presence of both types of sweeteners, e.g., "Sweetened with nutritive sweetener(s) (_____), and nonnutritive sweetener(s) (_____)" (the blanks to be filled in with the name of the sweeteners used).

(c) *"Low calorie" foods.* (1) A food may purport to be or be represented as low calorie only if:

(i) A serving of the food supplies no more than 40 calories, and

(ii) The food does not provide more than 0.4 calorie per gram, as consumed, and

(iii) The food bears on its principal display panel the term "low calorie," "low in calories," or "a low calorie food" in type size no smaller than one-half of the largest type size used on the label to represent, suggest, or imply special dietary usefulness, or type size 1/16 inch in height, whichever is larger.

(2) Foods that are low calorie within the meaning of paragraph (c)(1) of this section, as naturally occurring, without having any fabrication or alteration, may be labeled as a low calorie food, e.g., "celery, a low calorie food." They may may not be labeled with the term "low calorie" immediately preceding the name of the food because it would imply that the food has been altered to lower its calories with respect to other foods of the same type.

(d) *"Reduced calorie" foods, and other comparative claims.* (1) A food may be labeled as "reduced calorie," or with other terms representing or suggesting special dietary usefulness on the basis of a fabrication or alteration that makes the food lower in calories than a food it can substitute for in the diet only if:

(i) A comparison of the calorie content of a specified serving of the food with the calorie content of an equivalent serving of the same food without the fabrication or alteration of special dietary significance reveals a calorie reduction of at least one-third and of at least 25 calories per serving;

(ii) The food bears on its label a statement which clearly and concisely describes the comparison upon which the claim of special dietary usefulness is made. The statement shall either identify a specific food having at least one-third more calories and at least 25 more calories per serving for which the food can substitute, or indicate that the claim of special dietary usefulness is based on a comparison with the same food without the fabrication or alteration of special dietary significance. The statement shall also include a comparison between the calorie content of a specified serving of the food and an equivalent serving of the food it substitutes for, or the same food

without the fabrication or alteration of special dietary significance.

(iii) The food is not nutritionally inferior, under the criteria set forth in § 101.3(e) of this chapter, to the food for which it substitutes or the same food without the fabrication or alteration of special dietary significance, and

(iv) The food can be reasonably expected to substitute for a food having at least one-third more calories per serving, and at least 25 more calories per serving, that is sold in sufficient quantities that it is useful for those on calorie-restricted diets to be aware of the lower-calorie substitute for it.

(2)(i) Any food subject to this paragraph (d) which is similar in all its organoleptic properties to the food it is represented as substituting for, or to the food without the fabrication or alteration of special dietary significance, shall be labeled as "reduced calorie," "reduced in calories," or "a reduced calorie food" in type size no smaller than one-half of the largest type size used on the label to represent, suggest or imply special dietary usefulness, or type size 1/16 inch in height whichever is larger.

(ii) Any food subject to this paragraph (d) which does not resemble in all its organoleptic properties the specific food for which it substitutes, e.g., canned pears packet in unsweetened water, in comparison with pears in heavy syrup, may be labeled with appropriate terms to indicate its dietary usefulness, e.g., "for calorie restricted diets," but may not be labeled as "reduced calorie," "reduced in calories" or with any other terms in juxtaposition with its name or in the labeling that represents or suggests that the food is essentially the same as the other food in all its organoleptic properties except for a reduction in calories.

(3) It may not be technologically feasible to manufacture a "reduced calorie" food under the criteria set forth in this paragraph for all foods which are significant dietary source of calories and for which it would be useful to those on calorie-restricted diets to have a reduced calorie substitute. Accordingly, the Commissioner may establish by regulation acceptable alternative criteria for a "reduced calorie" food, in a regulation issued pursuant to section 401 of the act establishing a standard of identity for the food, in a regulation in Part 102 of this chapter establishing a common or usual name for the food, in an amendment to this section, or in a regulation issued pursuant to sections 201(n) and 403(a) of the act. A petition requesting such a regulation shall be submitted to the Hearing Clerk in the form established by Part 10 of this chapter. Under no circumstances will a food be permitted to be labeled as "reduced calorie" unless (i) the petition demonstrates that it is not feasible to attain a greater caloric reduction than that for which approval is sought and (ii) the petition demonstrates that the use of the food, with the caloric reduction attained, will result in a significant reduction in calories in the daily diet.

(e) *Label terms suggesting usefulness in regulating caloric intake or body weight.* (1) Except as provided in paragraph (e) (2) and (3) of this section, a food may be labeled with terms such as "diet," "dietetic," "for calorie restricted diets," "weight control," "artificially sweetened," "sweetened with nonnutritive sweetener," or other such terms representing or suggesting usefulness in regulating caloric intake or body weight only if: The food is labeled "low calorie" or "reduced calorie" or bears a comparative claim of special dietary usefulness in compliance with paragraph (c) or (d) of this section.

(2) Paragraph (e)(1) of this section shall not apply to any use of such terms which is specifically authorized by a regulation governing a particular food, or, unless otherwise restricted by regulation, to any use of the term "diet," which clearly shows that the food is offered solely for dietary use(s) other than regulating caloric intake or body weight, e.g., "for low-sodium diets."

(3) Paragraph (e)(1) of this section shall not apply to any use of such terms on a formulated meal replacement, low calorie meal, or other food that is represented to be of special dietary use as a whole meal pending the issuance of a regulation governing the use of such terms on such foods.

(f) *Use of terms such as "sugar free," "sugarless," "no sugar," etc.* Consumers may reasonably be expected to regard terms such as "sugar free," "sugarless," "no sugar," etc., as indicating a product which is low in calories or significantly reduced in calories. Consequently, except as provided in paragraph (f)(2) of this section, a food may not be labeled with such terms unless:

(1) It is labeled "low calorie" or "reduced calorie" or bears a comparative claim of special dietary usefulness labeled in compliance with paragraph (c) or (d) of this section, or

(2) The "sugarless" term is immediately accompanied, each time it is used, by the statement "Not a reduced calorie food" or "Not a low calorie food," such statement to be in a type size at least as large as the type size employed for the accompanying "sugarless" term.

§ 105.67 Label statements relating to food for use in the diet of diabetics.

(a) A food that purports to be represented or special dietary use because of usefulness in the diet of diabetics shall bear nutrition labeling in compliance with § 101.9 of this chapter, unless exempt under that section, and the statement "Diabetics: This product may be useful in your diet on the advice of a physician. This food is not a reduced calorie food." If the food is useful in maintaing or reducing calorie intake or body weight and labeled in conformity with § 105.66, the last sentence may be eliminated.

(b) A food shall not be represented to be useful in the diets of diabetics if such representation is false or misleading.

(c) The term "diabetic," "for diabetics," "diabetes," or the like, shall not be included as part of the name of any food, or otherwise be included on the labeling more prominently than the statement required by paragraph (a) of this section.

(d) The term "dietetic," "diet," or the like, shall not be included in the labeling of a food solely because of its possible usefulness in the diet of diabetics.

(e) A food shall not purport to be or be represented for special dietary use because of usefulness in the diet of diabetics solely by virtue of its being a food useful in reducing or maintaining caloric intake or body weight.

Interested persons may, on or before August 18, 1977, file with the Hearing Clerk, Food and Drug Administration, Rm. 4-65, 5600 Fishers Lane, Rockville, Md. 20857, written exceptions regarding this tentative order in relationship to the administrative record for this proceeding. Exceptions shall point out with particularity the alleged errors in the proposed findings of fact and tentative order and contain specific references to the pages of the transcript of testimony and to the exhibits on which the exceptions are based. Exceptions and accompanying briefs should be filed in quadruplicate (except that individuals may submit single copies), and should be identified with the Hearing Clerk docket number found in brackets in the heading of this document. Received exceptions and accompanying briefs may be seen in the above office Monday through Friday, from 9 a.m. to 4 p.m., except on Federal legal holidays.

Dated: July 5, 1977.

DONALD KENNEDY,
Commissioner of Food and Drugs.

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